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Review: Journal of Conflict Management and Sustainable Development
Volume 9 Issue 1

Mwati Muriithi





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Editor's Note

We are pleased to launch another issue of the *Alternative Dispute Resolution (ADR) Journal*, Volume 10, No.4.

The ADR Journal is a publication by the Chartered Institute of Arbitrators (CIArb), Kenya that spearheads intellectual discourse on pertinent and germane issues in Alternative Dispute Resolution and other related fields of knowledge. It offers a platform where scholars, ADR practitioners, judicial officers, law lecturers and students can share knowledge, ideas, emerging jurisprudence and reflect on practice in ADR. The Journal is aimed towards advancing the growth of ADR as a viable tool of management of disputes in Kenya and across the globe.

The role of ADR in access to justice has gained recognition in the recent past. In Kenya, the Constitution advocates the promotion of ADR mechanisms towards achieving access to justice. The Journal addresses some of the current concerns and challenges facing ADR mechanisms and proposes recommendations towards enhancing the suitability of ADR mechanisms in the quest towards Access to Justice.

The ADR Journal is devoted to the highest quality academic standards. It is peer reviewed and refereed in order to achieve this goal.

This volume contains papers and case reviews on salient themes in ADR including *The Role of State Agencies and Communities in Achieving Effective Environmental Conflicts Management; Binding Effect of Arbitration Clauses on Third Party Non Signatories: The Supreme Court of India's Perspective; The Nascent Blooming of ESG Disclosure into a Mega-Trend and its Likely Impact on Alternative Dispute Resolution; Valuing Energy, Price Reviews and the Role of Arbitration in Settling Energy Disputes; The Place of Environmental, Social and Governance (ESG) in Arbitration; Privacy and Confidentiality in Investor-State Arbitration Proceedings: The Abaclat Case; Ring-Fencing Arbitration Traits to Enhance its Growth and Development; Are Emergency Arbitrations Contemplated under the Indian Arbitration Act: Some Reflections from Indian Courts; Is Kenya Prepared to be safe seat for International Arbitration and Dispute Resolution as The Holy Grail of African Integration: Through the Lenses of Africa Continental Free Trade Area and The Belt*

and Road Initiative. It also contains a review of *the Journal of Conflict Management and Sustainable Development, Volume 9, issue 1*.

The Journal continues to shape the landscape in ADR practice in Kenya and beyond. It is one of the most widely cited and referenced publication in ADR. The Editorial Team welcomes feedback and suggestions from our readers across the globe to enable us continue improving the Journal.

I wish to thank the contributing authors, Editorial team, reviewers and everyone who has made this publication possible.

The Journal is committed towards equality and non-discrimination in academia and offers a platform where everyone can share his/her ideas and thoughts on key issues in ADR. To this end, the Editorial Board welcomes and encourages submission of papers, book reviews and case summaries on emerging and pertinent issues in ADR to be considered for publication in subsequent issues of the Journal.

The Editorial Board receives and considers each article but does not guarantee publication. Submissions should be sent to the editor through editor@ciarbkenya.org and adrjournal@ciarbkenya.org and copied to admin@kmco.co.ke.

The Journal is available online at <https://ciarbkenya.org/journals/>

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Nairobi, November 2022.

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Role of State Agencies and Communities in Achieving Effective Environmental Conflicts Management

*By: **Kariuki Muigua****

Abstract

Environmental conflicts affect not only the stability of a country but also the livelihoods of communities. This is especially true for communities living around the environmental resources causing the conflict in question. Considering that these conflicts have different actors involved in their origin as well as their management, it calls for concerted efforts from state agencies and communities towards addressing them. This paper discusses the role of state agencies as well as communities in management of environmental conflicts.

1. Introduction

Almost every community in the world occasionally has conflicts over ecological concerns, including, but not limited to, land use, environmental quality, water allocation, waste disposal, and natural resource management.¹ Environmental variables are important in many conflicts, either as direct causes of conflict or as its main drivers. There are many different types of environmental conflicts, ranging from value-based disputes over divergent notions of location, space, and our relationship with the natural world to interest-based rivalry over

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¹Humphreys, M., "Natural resources, conflict, and conflict resolution: Uncovering the mechanisms." *Journal of conflict resolution* 49, no. 4 (2005): 508-537; Bob, U. and Bronkhorst, S., "Environmental conflicts: Key issues and management implications." *African Journal on Conflict Resolution* 10, no. 2 (2010): 9-30.

limited or valuable natural resources. Conflicts involving the environmental drivers of identity, security, and health can also be based on needs.²

Notably, the management of natural resources in Africa using community-based methods has gained popularity over time.³ It has been argued that the two main ways for improving people's lives in order to create peace, stability, human security, and development are good governance and conflict management.⁴ In addition, the majority of conflicts arise as a result of the state's failure to address critical issues such as human rights, the rule of law, better economic opportunities, particularly for youths, health, educational, housing, and transportation facilities for the general public, and, most importantly, a functioning justice system. These challenges, it has been suggested, can be addressed if the government focuses on good administration and improving people's quality of life.⁵ States automatically become one of the key players in any conflict transformation process when they reframe conflict in terms of concerns relating to human rights since they have a responsibility to respect, safeguard, and uphold human rights.⁶

The need for concerted efforts in addressing environmental conflicts is justified by the observation that while the nation-states are the main players in global politics, they are not the only ones; the international system also includes

² Fisher, J., "Managing environmental conflict." *The handbook of conflict resolution: theory and practice* (2014): 3, p.1.

³ See Haro, G.O., Doyo, G.J. and McPeak, J.G., "Linkages between community, environmental, and conflict management: Experiences from Northern Kenya." *World development* 33, no. 2 (2005): 285-299.

⁴ Ahmar, Moonis. "Conflict Management and Good Governance in Pakistan: Lessons from Germany." *Journal of Political Studies, Special Conference Issue*, 2019, 211:221, at 211.

⁵ *Ibid*, at 211.

⁶ Lefevre N, 'The Human Rights-Based Approach to Conflict Transformation in Indigenous Contexts' <https://www.academia.edu/9964347/The_Human_Rights_Based_Approach_to_Conflict_Transformation_in_Indigenous_Contexts> accessed 21 August 2022, p.3.

international institutions, business entities, and non-state actors.⁷ Indigenous peoples see the deprivation of their basic human and indigenous rights as a threat to their very existence. This results in conflict between the state and its indigenous peoples and, if handled incorrectly, can result in bloodshed. Since disputes between indigenous peoples and the state are fundamentally about rights, it makes sense to think about using a human rights-based strategy to resolve disputes in these situations.⁸ This chapter discusses the place of State agencies in managing internal conflicts, non-state actors as well as the role of communities in achieving lasting peace.

2. Role of State Institutions in Environmental Conflict Management

Article 69(1) of the Constitution of Kenya outlines the obligations of State in respect of the environment as follows: The State should: ensure sustainable exploitation, utilisation, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits; work to achieve and maintain a tree cover of at least ten per cent of the land area of Kenya; protect and enhance the intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities; encourage public participation in the management, protection and conservation of the environment; protect genetic resources and biological diversity; establish systems of environmental impact assessment, environmental audit and monitoring of the environment; eliminate processes and activities that are likely to endanger the environment, and utilize the environment and natural resources for the

⁷ Ataman, M., "The impact of non-State actors on world politics: a challenge to Nation-States." *Alternatives: Turkish Journal of International Relations* 2, no. 1 (2003), p. 42.

⁸ Broberg M and Sano H-O, 'Strengths and Weaknesses in a Human Rights-Based Approach to International Development – an Analysis of a Rights-Based Approach to Development Assistance Based on Practical Experiences' (2018) 22 *The International Journal of Human Rights* 664; Davis, M., "Indigenous struggles in standard-setting: The United Nations Declaration on the Rights of Indigenous Peoples." *Melbourne Journal of International Law* 9, no. 2 (2008): 439-471.

benefit of the people of Kenya. Besides, every person is obligated to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.⁹ In addition to helping to modify institutional norms, the law can also help to influence attitudes and behaviour.¹⁰ Due to its distinguishing characteristics, the rule of law offers a practical framework for the peaceful resolution of conflicts. These characteristics include: establishing the societal norms and thereby ensuring dependability, justice, and stability; institutions capable of resolving conflicts; laws and mechanisms protecting citizens' rights.¹¹ It goes without a saying that the State obligations relating to environmental conservation and promoting sustainable development are part of the process of addressing environmental conflicts as well as preventing their emergence.

Notably, depending on the nature of the conflict, the state, including state institutions and officials, plays a strategic role in the management of domestic conflict, either as a mediator and peacekeeper or as a participant.¹² It has additionally been contended that while by and large, many (maybe most) country states emerged by success (e.g., by triumph of the most impressive primitive lord over more vulnerable adjoining medieval masters), and accordingly were brought into the world as struggle members instead of as referees, on account of Africa, imperialism assumed a significant part in using together people groups from a welter of nationalities, commonwealths, societies and areas under a solitary country state where it likewise granted struggle

⁹ Article 69(2), Constitution of Kenya, 2010.

¹⁰ Muigua, K., "Securing Our Destiny Through Effective Management of the Environment", *Journal of Conflict Management and Sustainable Development*, Volume 4, No 3, (May, 2020).

¹¹ Peace Building Initiative, "Introduction: Justice, Rule of Law & Peacebuilding Processes, 2009"
<<http://www.peacebuildinginitiative.org/indexe33f.html?pageId=1844>> accessed 21 August 2022.

¹² Abdulrahman, Imran, and Usman A. Tar, "Conflict management and peacebuilding in Africa: the role of state and non-state agencies," *Information, society and justice journal* 1, no. 2 (2008): 185-202, at 190.

between people groups of various foundation, especially concerning influence and asset.¹³

Regardless of the course of state arrangement, it is the obligation of the state to guarantee the upkeep of peace and lawfulness in the public eye where in dealing with the variety of human necessities and setting up systems for overseeing questions, the state capacities as a referee. Beside administration structures, the state likewise plans strategies and projects pointed toward working with serene conjunction among its assorted residents. Experiencing the same thing of savage struggle, the state liability goes past only the stoppage of viciousness, to executing drives focused on the goal of the contention issue(s) among the disputants.¹⁴

3. Role of Communities in Conflict Management

In some African nations, violent inter - group conflict is seen on a yearly basis. It is frequently organised according to identity. The conflicts frequently revolve around local land, raw materials, or political power. These conflicts pose a serious danger to human security and development, despite the fact that they often stay localized and are not directed at the central state.¹⁵

While communal conflicts in some areas only result in a few fatalities or are resolved before any fatalities occur, in other areas, these disagreements turn violent and result in the deaths of dozens, hundreds, or even thousands of people.¹⁶ The term "communal conflict" refers to disputes between non-state

¹³ Ibid, at 190.

¹⁴ Ibid, at 191.

¹⁵ Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation) <<http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640>> accessed 26 August 2022.

¹⁶ Brosché, Johan, 'Causes of Communal Conflicts: Government Bias, Elites and Conditions for Cooperation,' Expert group for Aid Studies, Swedish Ministry of Foreign Affairs, 2015, p.3. Available at

organisations that are unified by a common identity.¹⁷ Since group identity is thought to be socially constructed rather than a static phenomenon, some people would equate the concept of communal identity with ethnic or religious identity, but others have purposefully left the definition more ambiguous. The communal identity is conceptualized as subjective group identification based on, for example, a common history, culture, or core values.¹⁸

Governments, it has been said, are rarely able to act as an impartial arbitrator in situations of intercommunal conflict since, when such a dispute arises, political leaders are frequently linked to its origin. This can happen directly through bias or provocation, or it can happen inadvertently due to poor policies and a failure to treat all individuals equally. As a result, politicians have to make an effort to find and promote conflict resolution techniques that are respected in the community. Traditional leaders, community-based organisations, and NGOs may fall under this category.¹⁹

Communities must be given the chance to describe how conflicts are manifesting in the broader socioeconomic setting. They must be given the chance to recognize external elements that fuel conflict and to create locally suitable conflict resolution techniques.²⁰

<https://uu.diva-portal.org/smash/get/diva2:899332/FULLTEXT01.pdf> accessed 21 August 2022.

¹⁷ Ibid, p.4.

¹⁸ Ibid, p.4.

¹⁹ Elfversson E, 'How Government Bias Can Fuel Communal Conflicts in Africa' (The Conversation)

<http://theconversation.com/how-government-bias-can-fuel-communal-conflicts-in-africa-121640> accessed 26 August 2022.

²⁰ Frank, E., "A participatory approach for local peace initiatives: The Lodwar border harmonization meeting," *Africa Today* (2002): 69-87, p. 72.

4. The Place of the State and the Communities in Addressing Environmental Conflicts: Striking the Balance

a. Addressing the Bias and legitimacy

The government's capacity to control intercommunal disputes declines if the state is biased toward the conflict players. The circumstances that support collaboration are subject to other players' influence. Because it has the power to change a number of variables crucial to intercommunal interactions, the government's behaviour is crucial. The strategic interests of the government are important when determining whether or not to interfere in a community conflict, because biased choices about property rights raise the likelihood of conflicts. Additionally, central players might form alliances with local actors engaged in conflict, which could intensify contacts between central and local elites as well as interactions among local elites, potentially leading to war.²¹

The government will be better able to control the community strife if the state has a high level of democracy. The ability of democratic institutions and procedures to support the aspects of rights, equality, and accountability is directly correlated with the degree to which government is responsive to the interests and requirements of the greatest number of individuals.²²

Some academics advise using the following set of best practices when using collaborative decision-making processes: An agency should first decide if a cooperative strategy to finding agreements is necessary; Stakeholders should be able and willing to engage in the process and support it; Agency executives should encourage the process and guarantee there are enough resources to hold the process; A collaborative procedure to find an agreement should start with an evaluation; There should be consensus among all participants about ground

²¹ Brosché J, 'Conflict Over the Commons: Government Bias and Communal Conflicts in Darfur and Eastern Sudan' (2022) 0 *Ethnopolitics* 1.

²² United Nations, 'Rule of Law and Democracy: Addressing the Gap between Policies and Practices' (United Nations) <<https://www.un.org/en/chronicle/article/rule-law-and-democracy-addressing-gap-between-policies-and-practices>> accessed 26 August 2022.

rules, rather than just the sponsoring organisation setting them; The sponsoring organisation ought to guarantee the facilitator's objectivity and responsibility to each participant; Planning for execution of the agreement should begin as soon as the process is initiated by the agency and participants; and these processes should be governed by guidelines rather than rigid rules.²³

b. Environmental Governance Through Civic Engagement

Institutionalized participation can go a long way in enhancing the role of communities in addressing environmental conflicts in the country. To guarantee citizens enjoy unhindered justice and the rule of law, which are essential for sustainable development, responsible and inclusive institutions guided by the law may help to promote and ensure inclusive public policymaking that leaves no one behind.²⁴

Decision-making about environmental and natural resource policies is evolving. As parties resolve policy issues, citizens and management agency staff are increasingly looking for methods to "do things differently" and to actively engage in the decision-making process. Nowadays, "doing things differently" refers to working together.²⁵

²³ Walker GB and Daniels SE, 'Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work' (2019) 4 *Frontiers in Communication* <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002>> accessed 26 August 2022.

²⁴ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 26 July 2022.

²⁵ Daniels S and Walker G, 'Working through Environmental Conflict: The Collaborative Learning Approach' [2001] *Working through Environmental Conflict* 1.

c. Capacity building for Enhancing Participatory Conflict Management

In order for less powerful parties to participate fairly in a process of consensual negotiation, it is essential to create a level playing field.²⁶ Although the terms "capacity building" and "capacity development" are frequently used to refer to a wide range of activities, in the broadest sense, capacity refers to a party's ability to solve problems and accomplish goals, and capacity building aims to improve parties' ability to collaborate for their mutual benefit by giving them the knowledge and resources they need to identify problems and formulate solutions.²⁷ Since it encompasses the total system, environment, or context in which people, organisations, and societies operate and interact, capacity building is larger than organizational development. It is seen as the process through which people, groups, organisations, institutions, and communities improve their capacity to: (1) carry out essential tasks, solve issues, set and attain goals; and (2) comprehend and address their developmental requirements in a comprehensive and sustainable manner.²⁸

It has also been correctly noted that the provision of basic human needs, such as food, clean drinking water, health care, basic education, and economic possibilities within a society, is a prerequisite for developing capacity for effective governance and conflict management.²⁹ Nevertheless, capacity building goes well beyond meeting the minimum requirements. It is an issue of

²⁶ Warner, M., "Conflict management in community-based natural resource projects: experiences from Fiji and Papua New Guinea" (2000), p. 30.

²⁷ Corissajoy, 'Capacity Building' (*Beyond Intractability*, 6 July 2016) <<https://www.beyondintractability.org/essay/capacity-building>> accessed 20 August 2022; see also Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (MediateGuru, 20 March 2021) <<https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts>> accessed 20 August 2022.

²⁸ Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." *The Institute of Cultural Affairs, Zimbabwe*, available at http://assets.sportanddev.org/downloads/participatory_capacity_building_full.pdf. Accessed on February 10 (2003): 2020, p. 4.

²⁹ Corissajoy, 'Capacity Building' (*Beyond Intractability*, 6 July 2016) <<https://www.beyondintractability.org/essay/capacity-building>> accessed 20 August 2022.

development at all societal levels, which includes institutional, community, and economic development. Knowledge and technical skills, organizational and institutional capacity, and the capacity to foresee, manage, and resolve disputes are some of the key assets that people, organisations, communities, and governments need in order to reach their full potential.³⁰

Notably, capacity building is a perpetual and mutually reinforcing process of changing people's attitudes, values, and organizational practices while accumulating the necessary knowledge and skills among different partners in a partnership. The goal is to improve each partner's capacity to make wise decisions about their own lives and to fully accept the consequences of those decisions.³¹ It has also been pointed out that despite the fact that there are many different approaches to building capacity, the capacity-building strategy for resolving conflicts is essential because it gives people the tools they need to recognize conflicts, properly analyze their options for dealing with them, solve them, and prevent future ones.³²

The need for capacity building is justified on the observation that long-term, conflict resolvers help parties build better relationships with one another in order to increase institutional and interpersonal capacity to resolve or de-escalate conflict in the future and stop it from turning violent. This entails helping the parties examine their underlying presumptions and attitudes about their enemies and, if necessary, change them.³³ While acknowledging that conflict is common and frequently beneficial, conflict resolvers detest the

³⁰ Ibid.

³¹ Geene, J. V. "Participatory Capacity Building: A Facilitator's Toolbox for Assessment and Strategic Planning of NGO Capacity." *The Institute of Cultural Affairs, Zimbabwe*, available at http://assets.sportanddev.org/downloads/participatory_capacity_building_full.pdf. Accessed on February 10 (2003): 2020, p. 4.

³² Lattanzio DJ, 'Capacity Building: A Powerful Tool to Prevent and Resolve Conflicts' (*MediateGuru*, 20 March 2021) <<https://www.mediateguru.com/post/capacity-building-a-powerful-tool-to-prevent-and-resolve-conflicts>> accessed 20 August 2022.

³³ Lutz EL, Babbitt EF and Hannum H, 'Human Rights and Conflict Resolution from the Practitioners' Perspectives' (2003) 27 *The Fletcher Forum of World Affairs* 173, p. 179.

bloodshed, suffering, and loss of life it causes. They support constructive tactics over destructive ones because they feel that there are both productive and destructive ways to handle conflict.³⁴

Sustainable Development Goal (SDG) 16 seeks to ‘promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels’. In line with this, there is a need for the Government to invest in strengthening conflict management institutions both formal and informal. While formal institutions are mainly pegged on the state, the informal ones require strong and empowered communities for their efficiency. As such, there should be empowerment of both state institutions and the communities.³⁵

5. Conclusion

It is possible for the various parties (government agencies, stakeholder organisations, and citizens) to look for a collaborative approach as an alternative to adversarial conflicts when environmental or natural resource conflicts have arisen. By doing this, they will be able to work through conflicts to find common ground and make wise decisions.³⁶ SDG 16 and the SDGs as a whole must be accomplished through partnerships, integrated solutions, and the initiative and leadership of countries and member states in reshaping the institutional and social landscape and laying the foundation for significant reforms that support

³⁴ Ibid, p. 179.

³⁵ ‘Peacebuilding Needs Strong Communities as Well as Strong Institutions’ (Peace Insight) <<https://www.peaceinsight.org/en/articles/peacebuilding-needs-strong-communities-as-well-as-strong-institutions/>> accessed 12 September 2022; ‘4 Governance and Conflict Resolution in Multi-Ethnic Societies’ <<https://archive.unu.edu/unupress/unupbooks/uu12ee/uu12ee05.htm>> accessed 12 September 2022.

³⁶ Gregg B Walker and Steven E Daniels, ‘Collaboration in Environmental Conflict Management and Decision-Making: Comparing Best Practices with Insights from Collaborative Learning Work’ (2019) 4 *Frontiers in Communication* <<https://www.frontiersin.org/articles/10.3389/fcomm.2019.00002>> accessed 26 August 2022.

the establishment of sustainable peace.³⁷ Because marginalization and exclusion may have a destabilizing effect, it is essential to adopt an inclusive and participatory approach to development.³⁸

Better economic climates, greater per capita incomes, higher educational achievement, and more social cohesiveness have all been benefits of peaceful societies.³⁹ Better interpersonal ties within a community tend to promote higher levels of peace by preventing the emergence of tensions and lowering the likelihood that conflicts would turn violent.⁴⁰

It is imperative that conflict management efforts should aim at strengthening both state agencies and communities as both have a distinct role to play.

³⁷ 'SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 20 August 2022.

³⁸ SDG 16 as an Accelerator for the 2030 Agenda' (UNDP) <<https://www.undp.org/content/undp/en/home/blog/2019/sdg-16-as-an-accelerator-for-the-2030-agenda.html>> accessed 20 August 2022

³⁹ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 2 <<https://issat.dcaf.ch/ser/Learn/Resource-Library/Policy-and-Research-Papers/Pillars-of-Peace-Understanding-the-key-attitudes-and-institutions-that-underpin-peaceful-societies>> accessed 20 August 2022

⁴⁰ The Institute for Economics and Peace (IEP), 'Pillars of Peace - Understanding the Key Attitudes and Institutions That Underpin Peaceful Societies - International Security Sector Advisory Team (ISSAT)', p. 6.

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Binding Effect of Arbitration Clauses on Third Party Non Signatories: The Supreme Court of India's Perspective

*By: Wilfred A Mutubwa **

Appellant	Respondent
Oil and Natural Gas Corporation (ONGC)	Discovery Enterprises

FACTS IN ISSUE

ONGC entered into contract with Discovery Enterprises, a company with strong associations with the Jindal Group. Disputes arose between the parties and ONGC invoked arbitration as provided in the contract. However, ONGC instituted the proceedings against both Discovery Enterprises and the Jindal Group because, according to ONGC; Discovery and Jindal were a single economic entity as Jindal was the ultimate beneficiary of Discoveries' actions and thus the corporate veil ought to be lifted and Jindal ought to be compelled to arbitrate. Jindal objected to this and sought its removal from the Arbitration by filing an Application under Section 16 of the Arbitration and Conciliation Act 1996. Jindal hinged its application on the fact that since it was not a party to the Arbitration Agreement, the Tribunal lacked jurisdiction in relation to it.

During the proceedings, ONGC filed an Application for the discovery and inspection of documents to demonstrate that Discovery Enterprises was a proxy of Jindal Group. The Tribunal decided to defer this Application until Jindal's

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Application was decided. The Tribunal eventually decided that Jindal was not a signatory to the Arbitration Agreement and thus was struck off the list of parties. ONGC appealed the decision at the High Court in Bombay, under Section 37 of the Arbitration Act but the Appeal was unsuccessful, they then appealed to the Supreme Court.

ISSUES

1. Whether an arbitration clause found in an Agreement between two parties, could be considered as a binding Arbitration Agreement on a third party who is not a signatory to the agreement due to the party's conduct;

RULES

1. Group of Companies doctrine: Non signatories to an Arbitration Agreement can be forced to Arbitrate if the conduct of the parties involved evidences a clear intention of the parties to bind both the signatories and non-signatories or where there is a tight group structure between a signatory and non-signatory with strong organizational and financial links, so as to constitute a single economic unit, or a single economic reality

ANALYSIS

The Court interpreted and applied the group of companies' doctrine in the context of the enforcement of a domestic arbitration award against a non-signatory to the arbitration agreement. The Court affirmed that due to the complex nature of commercial transactions; which are often effected through multiple layers and agreements, there may be transactions within a group of companies. The circumstances in which they have entered into them may reflect

an intention to bind both signatory and non-signatory parties within the same group.

The court stated that when holding that a non-signatory to an Arbitration Agreement is bound by it, the court ought to approach the matter by attributing a meaning consistent with the business sense to the transactions which was intended to be ascribed to them. Therefore, it is important to consider factors such as the relationship of a non-signatory to a signatory of the agreement, the commonality of subject matter and the composite nature of the transaction in assessing whether the doctrine can apply. The Group of Companies doctrine is therefore essentially meant to facilitate the fulfilment of a mutually held intent between the parties, where the circumstances indicate that the intent was to bind both signatories and non-signatories.

The “group of companies” doctrine can therefore be invoked:

- a) To bind the non-signatory affiliate of a company, or inclusion of a third party to an arbitration, if there is a direct relationship between the party which is a signatory to the arbitration agreement;
- b) Where there is a tight group structure with strong organisational and financial links, so as to constitute a single economic unit, or a single economic reality.

The corporate veil can therefore be pierced to bind non-signatories upon a construction of the arbitration agreement, taking into account the apparent intention at the time of entering the contract and the performance of the underlying contract.

The court iterated that when assessing whether a company within a group of companies which is not a signatory to arbitration agreement would nonetheless be bound by it, the law considers the following factors:

- i. The mutual intent of the parties;
- ii. The relationship of a non-signatory to a party which is a signatory to the agreement;
- iii. The commonality of the subject matter
- iv. The composite nature of the transaction; and
- v. The performance of the contract.

JUDGEMENT

The Supreme Court held that the Tribunal failed to address the applicability of the "group of companies" doctrine in this case. The Court also held that ONGC's Application for discovery may have brought on record documents which would demonstrate the economic unity of the Jindal Group and Discovery Enterprises, and that the Tribunal erred in not deciding this Application prior to determining Jindal's jurisdictional challenge.

The Supreme Court thus set aside the Tribunals order and returned the matter back to the Tribunal to decide Jindal's jurisdictional challenge afresh.

The Nascent Blooming of ESG Disclosure into A Mega-Trend and Its Likely Impact on Alternative Dispute Resolution

*By: Jacqueline Waihenya **

Disclosure and Reporting has emerged into a mega-trend demanded by social investors, regulators and activists. New response by the various players are emerging at an extremely fast pace creating dynamic vortexes into which systems, structures, policies and compliance requirements are developing creating a fertile environment for disputes to emerge. Appropriate Dispute Resolution mechanisms will as a matter of course be demanded and it is therefore critical that closer examination into this space be rendered. This paper seeks to capture key ESG issues that are emerging and their anticipated impact on ADR.

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Vice Chair - Chartered Institute of Arbitrators Kenya Branch [2017 to 2022]; Member, National Steering Committee for the Formulation of the Alternative Dispute Resolution Policy 2020/2021; Vice Chair - Kenya National Chamber of Commerce & Industry (Mombasa Chapter) [2019-2021]; Vice Chair - Mombasa Law Society [2021] and Associate Editor, CIARB-ADR Journal 2020-2022.

1. The Environmental Social & Governance (ESG) Reporting Mega-Trend:

Emerging as a critical aspect of investment due diligence and stewardship is the non-financial pillar which has come to comprise scrutiny into environmental risks, social issues, as well as governance reforms and which has crystallized into the moniker “ESG”.¹

ESG is now increasingly regarded as integral to investment decision-making and a critical source for defining and framing fiduciary duties leaving institutions with no option but to take the long-term view and focus on good corporate governance strategies.² In addition to this ESG agendas have come to dominate legal, political and business agendas with courts, governments and investors expecting companies to facilitate the energy transition and take steps to safeguard workers’ human rights, two ESG pillars seen as central to building back better in the wake of the COVID-19 pandemic.³

Prior to this in 2015 the United Nations established 17 integrated, indivisible and global universally accepted Sustainable Development Goals⁴ with 169 targets and 232 indicators to accomplish universal efforts geared towards protecting the environment, reducing poverty, and securing our peace and

¹ Alexander T. Kraik, 'Environmental, Social, and Governance Issues: An Altered Shareholder Activist Paradigm' (2020) 44 Vt L Rev 493. Available at Heinonline. [Last accessed on 13 October 2022]

² Ibid

³ Amanda Neil, *International Arbitration in 2022: The Rising Significance of ESG and the Role of International Arbitration*. Freshfields Bruckhaus Derringer. Available at <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/> [Last accessed on 13 October 2022]

⁴ United Nations, *Transforming our World: the 2030 Agenda for Sustainable Development* (2015). Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/291/89/PDF/N1529189.pdf?OpenElement> [Last accessed on 13 October 2022]

prosperity.⁵ Since then there has been a rapidly growing interest across business, government, and civil society in using disclosure regimes to transform corporate behavior to such an extent that this has become a “mega-trend” that is here to stay primarily through adoption by the corporate world of voluntary reporting on ESG indicators.⁶

About 85 countries have new or revised responsible investment policy instruments as at 2021⁷ of which 25 countries now have mandatory ESG reporting⁸ while the *European Union Corporate Sustainability Reporting Directive* widely expected to replace the *EU Non-Financial Reporting Directive*⁹ later in the year 2022 will require EU member states to transpose this directive into their national laws within 18 months and will elevate sustainability reporting to become at par with financial reporting.¹⁰ It has been argued that the advent of

⁵ Vu Minh Hieu & Nguyen Thai Hai (2022): *The role of environmental, social, and governance responsibilities and economic development on achieving the SDGs: evidence from BRICS countries*, Economic Research-Ekonomska Istraživanja Available at <https://doi.org/10.1080/1331677X.2022.2086598> [Last accessed on 13 October 2022]

⁶ Rebecca Susko, *The First Amendment Implications of a Mandatory Environmental, Social, and Governance Disclosure Regime* (2018) 48 *Envtl L Rep News & Analysis* 10989 Available at Heinonline [Last accessed on 13 October 2022]

⁷ Hazell Ransome, Karen Kerschke, Junru Liu, Freya Bannochie, the PRI’s Policy team, *88 new policies added to PRI’s regulation database*, PRI Blog 17 September 2021. Available at <https://www.unpri.org/pri-blog/88-new-policies-added-to-pri-regulation-database/8532.article> [Last accessed on 13 October 2022]

⁸ World favour, *Countries Affected by Mandatory ESG Reporting, Heres the List* (2021) Available at <https://blog.worldfavor.com/countries-affected-by-mandatory-esg-reporting-here-is-the-list> [Last accessed on 13 October 2022]

⁹ European Union, *Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups*. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32014L0095> [Last accessed on 13 October 2022]

¹⁰ Peter Wollmert & Andrew Hobbs, *The Corporate Sustainability Reporting Directive contributes to extending the European Green Deal across all sectors and existing regulation* EY

the Ukraine war has further served to peak the importance of ESG as geopolitical and human rights have been brought to the fore of sustainable finance.¹¹

2. The Principles of ESG:

The *Ten Principles of the United Nations Global Compact*¹² comprise the world's largest corporate sustainability initiative¹³ and they are geared towards getting companies to embed a principles-based approach to doing business.¹⁴ ESG reporting for its part is essential for curating a robust portfolio that attracts investment and this facilitates an organization to better understand and manage their impact on people and the planet as well as identify and mitigate risks, seize new opportunities and be responsive to build brand value and trust.¹⁵

The Ten Principles are derived from the *Universal Declaration of Human Rights*,¹⁶ the *International Labor Organization's Declaration on Fundamental Principles and*

Ernest & Young Global Limited (1 August 2022) Available at https://www.ey.com/en_sa/assurance/how-the-eu-s-new-sustainability-directive-will-be-a-game-changer [Last accessed on 13 October 2022]

¹¹ Lucy Pérez, Dame Vivian Hunt, Hamid Samandari, Robin Nuttall and Krysta Biniek, *Does ESG Really Matter and Why?* (10 August 2022) Mckinsey <https://www.mckinsey.com/capabilities/sustainability/our-insights/does-esg-really-matter-and-why> Available at [Last accessed on 22 October 2022]

¹² Available at <https://www.unglobalcompact.org/what-is-gc/mission/principles> [Last accessed on 22 October 2022]

¹³ Indra, *Sustainability/ Our Commitment to the SDGs: Committed to the Ten Principles of the Global Compact for Responsible Business*. Available at <https://www.indracompany.com/en/sustainability/commitment-sdgs/committed-ten-principles-global-compact-responsible-business> [Last accessed on 14 October 2022]

¹⁴ Michelle Winters, *16 Foundational Principles for ESG Reporting*, Conservice ESG (17 September 2021) Available at <https://www.gobyinc.com/16-principles-for-esg-reporting/> [Last accessed on 14 October 2022]

¹⁵ Ibid

¹⁶ Available at <https://www.un.org/en/about-us/universal-declaration-of-human-rights> [Last accessed on 22 October 2022]

Rights at Work,¹⁷ the *Rio Declaration on Environment and Development*,¹⁸ and the *United Nations Convention against Corruption*.¹⁹ The principles can be categorized into 4 key pillars of Human Rights, Labour Standards, Environment and Anti-corruption as follows:²⁰

2.1 Human Rights

Principle 1 and 2 comprise the Human Rights principles and simply put require businesses to support and respect the protection of internationally proclaimed human rights and further make sure that they are not complicit in human rights abuses.²¹

2.2 Labour Standards

There are 4 principles relating to labour the key one stating that businesses must uphold workers freedom of association and recognise their rights to collective bargaining. The fourth principle supports the elimination of all forms of forced and compulsory labour whilst Principle 5 supports the effective abolition of child labour and Principle 6 supports the elimination of discrimination in respect of employment and occupation.²²

¹⁷ Available at <https://www.ilo.org/declaration/lang--en/index.htm> [Last accessed on 22 October 2022]

¹⁸ Available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf [Last accessed on 22 October 2022]

¹⁹ Available at https://www.undp.org/lebanon/projects/united-nations-convention-against-corruption?utm_source=EN&utm_medium=GSR&utm_content=US_UNDP_PaidSearch_Brand_English&utm_campaign=CENTRAL&c_src=CENTRAL&c_src2=GSR&gclid=EAIaIQobChMI8oPzxtH0-gIVDtVCh0LTQq3EAAAYASAAEgJNzPD_BwE [Last accessed on 22 October 2022]

²⁰ Supra Ibid at Note 15

²¹ Ibid

²² Ibid

2.3 Environment

There are three principles under this head starting with Principle 7 which require businesses to support a precautionary approach to environmental challenges. The other 2 enjoin business to undertake initiatives that promote greater environmental responsibility as well as encourage the development and diffusion of environmentally friendly technologies.²³

2.4 Anti-corruption

Principle 10 is the anti-corruption principle cautioning against all forms of corruption, including extortion and bribery.²⁴

In addition to this, the *United Nations Principle for Responsible Investments Association published An Introduction to the Principles for Responsible Investment*²⁵ (UNPRI) was founded by the UN to promote the incorporation of ESG factors into investment decision-making promotes the incorporation of ESG factors into investment decision-making. Per the then UN Secretary General, Ban Ki Moon, these Principles quickly became the global benchmark for responsible investing²⁶ which is founded upon the Institutional Investors duty to act in the best long-term interests of their beneficiaries in the following ways, that is to say, (1) incorporate ESG issues into investment analysis and decision-making processes; (2) actively incorporate ESG into an organisations policies & practices; (3) seek appropriate disclosure on ESG issues by the entities in which they invested; (4) promote acceptance and implementation of the Principles within the investment industry; (5) work together to enhance our effectiveness in implementing the principles; (6) report on the company's activities and

²³ Ibid

²⁴ Ibid

²⁵ Available at <https://www.swedfund.se/media/1038/un-pri-principles-for-responsible-investment.pdf> [Last accessed on 13 October 2022]

²⁶ Ibid

progress towards implementing the principles.²⁷ Currently, the number of institutional investors who have signed up for the UNPRI exceeded 7,000 from at least 135 countries²⁸ and the number continues to grow.

3. ESG Regulation:

Following the 2007-2009 global financial crisis the singular pursuit of financial profit alone came to be considered by many to be unsustainable and detrimental to long-term societal interests.²⁹ Since then a concerted effort to use and influence the financial system to mobilise capital for sustainable development and widespread social benefit has found expression in the emergent field of “sustainable finance”.³⁰ The financial world has further proposed one meaning of sustainability in finance to be the practice of identifying repeatable sources of value.³¹

Drawing from the classic definition of sustainable development by the UN Brundtland Commission’s to the effect that it is the kind of development that meets the needs of the present without compromising the ability of future generations to meet their own needs³² the European Commission has come to define sustainable finance as the process of factoring ESG considerations when

²⁷ Ibid

²⁸ United Nations Principle for Responsible Investments Website (2022) Available at <https://www.unpri.org/about-us/about-the-pri#:~:text=With%207%2C000%20corporate%20signatories%20in,largest%20voluntary%20corporate%20sustainability%20initiative>. [Last accessed on 21 October 2022]

²⁹ Satyajit Bose, Guo Dong, Anne Simpson, *The Financial Ecosystem: The Role of Finance in achieving Sustainability* (2019) Palgrave McMillian

³⁰ Ibid

³¹ Ibid

³² United Nations, *Our Common Future Report of the World Commission on Environment and Development, Chapter 2: Towards Sustainable Development* (1987) Available at <http://www.un-documents.net/ocf-02.htm> [Last accessed on 22 October 2022]

making investment decisions in the financial sector, leading to increased longer-term investments into sustainable economic activities and projects.³³

Thus ESG investing as a source of sustainable finance has come to encompass an ever-expanding array of regulations, standards and expectations regarding the responsible management of a wide range of issues³⁴ the genesis of which is traceable to the transition from the shareholder to the stakeholder model which incorporates corporate social responsibility in business and governmental entities with a long-term value view as well as a heightened demand for data related to ESG practices and responsible investing geared towards more sustainable perspectives benefitting risk management and alignment with societal values.³⁵

The regulatory environment has therefore responded especially with regards to capital markets to measure financial performance in the short, medium and long terms horizons of listed companies³⁶ with jurisdictions at national, regional and local levels enacting regulations over ESG topics.³⁷ Companies are therefore building in ESG into their business strategies, objectives and projects including achieving net-zero (carbon) emissions as well as aligning with 2050 Paris Accords, improving diversity inclusion, participation and equity for underrepresented groups³⁸ as well as energy use and therefore for instance the

³³ European Commissions, *Overview of Sustainable Finance*. Available at https://finance.ec.europa.eu/sustainable-finance/overview-sustainable-finance_en [Last accessed on 22 October 2022]

³⁴ Boffo, R., and R. Patalano (2020), *ESG Investing: Practices, Progress and Challenges*, OECD Paris, www.oecd.org/finance/ESG-Investing-Practices-Progress-and-Challenges.pdf [Last accessed on 21 October 2022]

³⁵ Ibid

³⁶ Ibid

³⁷The Institute of Internal Auditors, *Global Perspectives & Insights: The ESG Landscape* (2022) Available at https://www.theiia.org/globalassets/site/content/articles/global-perspectives-and-insights/2022/gpi_the_esg_risk_landscape_parts_1-3-final.pdf [Last accessed on 22 October 2022]

³⁸ Ibid

U.S. government requires companies doing more than \$8.5 million in contracting with federal agencies to disclose whether they publish a Greenhouse Gas Emissions inventory report for Scope 1 and Scope 2 emissions, as well as provide a link to a website where it is publicly available.³⁹

Be that as it may, the ESG landscape is highly dynamic and now boasts a multiplicity of taxonomy's and models.⁴⁰

3.1 The European Union:

As intimated above the *EU's Corporate Sustainability Reporting Directive* is expected to replace the EU's Non-Financial Reporting (NFR) directive. Expected changes include moving from non-financial reporting to "sustainability reporting" requiring more quantitative reporting. Disclosure by companies on how they influence the environment and community ("outbound"), as well as how the environment affects the community ("inbound") will be expected. Further *the EU Taxonomy* gives companies, investors, and policymakers direction on which economic activities can be considered environmentally sustainable and this focuses on 6 objectives: (1) climate change mitigation; (2) climate change adaptation; (3) sustainable use and protection of water and marine resources; (4) transition to a circular economy (recycling focused); (5) pollution prevention and control; and (6) the protection and restoration of biodiversity and ecosystems. In addition to this the *EU Data Strategy* aims to create a single market for data, allowing it to flow freely within the EU as well as across sectors.⁴¹

3.2 The United States of America:

In March 2022, the US Securities & Exchange Commission (SEC) announced that public companies would be required to disclose extensive climate-related

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

information in their SEC filings.⁴² The SEC then proposed 2 form and rule amendments in May 2022 to enhance and standardize disclosure of ESG factors and further expand the regulation of naming of funds with ESG focus.⁴³ The SEC further established the SEC's Climate and ESG Task Force to review disclosure related to ESG issues.⁴⁴

3.3 The United Kingdom:

The UK's *Greening Finance: A Roadmap to Sustainable Investing*⁴⁵ has given clear indication that ESG reporting is steadily shifting in the UK towards the mandatory. Thus, organisations whose financial years started after 6 April 2022 will be required to comply with Task Force on Climate-Related Financial Disclosures (TCFD) based reporting. These new provisions affect more than 1,300 of the largest UK-registered companies and financial institutions including many of the UK's largest traded companies, banks and insurers and large private companies.⁴⁶ The roadmap anticipates 3 distinct phases starting with providing useful information, mainstreaming this information into business and financial decisions ultimately shifting financial flows across the country to align with a net zero and nature positive economy.

⁴²Maia Gez, Taylor Pullins, Claudette Druehl & Fatima A. Hassan Ali, SEC Proposes Amendments to Rules to Regulate ESG Disclosures for Investment Advisers & Investment Companies (13 June 2022) Available at <https://www.whitecase.com/insight-alert/sec-proposes-amendments-rules-regulate-esg-disclosures-investment-advisers-investment> [Last accessed on 22 October 2022]

⁴³ Ibid

⁴⁴ Ibid

⁴⁵ Available at <https://www.gov.uk/government/publications/greening-finance-a-roadmap-to-sustainable-investing> [Last accessed on 22 October 2022]

⁴⁶ Sarah Ward, Nathan Patten, Charlotte Lo, *Mandatory ESG reporting is here, and Finance needs to get ready: What are the 10 key considerations for the CFO?* (20 May 2022) KPMG UK Blog Available at <https://home.kpmg/uk/en/blogs/home/posts/2022/05/mandatory-esg-reporting.html> [Last accessed on 22 October 22]

3.4 The Republic of South Africa:

South Africa boasts one of the leading global approaches to ESG disclosure and reporting as the country introduced integrated reporting following the King IV® Code on Corporate Governance.⁴⁷ King IV® recommends the adoption of the *UN Global Reporting Initiative (GRI) Standards (2016)*⁴⁸ framework which provides a benchmark for global standards, norms and voluntary initiatives.⁴⁹ The country further adopted the Carbon Disclosure Project in 2007, a system by which organisations measure, disclose and manage their environmental information, promoting the inclusion of climate-related information in mainstream corporate financial reporting.⁵⁰ RSA embraces the International Integrated Reporting Council, Integrated Reporting Framework under the auspices of its Integrated Reporting Committee established under King IV®.

3.5 The Republic of Kenya:

Kenya has a robust approach to corporate governance and the Capital Markets Authority leads the way in regards to financial sustainability. The CMA issued its *Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015* which now imposes mandatory corporate ESG reporting that has moved beyond comply or explain to an “apply and explain” basis at Clause 1.1.1 and is well beyond the international best practice. The *Stewardship Code for Institutional Investors, 2017* for its part imposes a comply or explain standard per its Application provisions at paragraph 5.

⁴⁷ *ESG Topics, Key Environmental Social and Governance Topics: Corporate ESG reporting and disclosure frameworks*, Available at https://rioguide.batseta.org.za/eg_advisory/10-3-corporate-esg-reporting-and-disclosure-frameworks/ [Last accessed on 22 October 2022]

⁴⁸ Available at <https://www.globalreporting.org/standards/> [Last accessed on 22 October 2022]

⁴⁹ *Supra* Ibid No 44

⁵⁰ *Ibid*

The Central Bank of Kenya via its *Guidance on Climate related Risk Management, 2022* further requires institutions licensed under the *Banking Act (Cap 488)*⁵¹ such as banks, life insurers and regulated pension entities and product level players pursuant integrate climate-related financial risks in their risk management frameworks⁵² imposing upon the Board and Senior Management of regulated entities to prepare an annual Risk Appetite Statement initially on a qualitative basis with the stated intention of moving towards quantitative metrics to facilitate tracking and monitoring.⁵³

The *National Action Plan on Business & Human Rights, 2019*⁵⁴ domesticated the *UN Guiding Principles on Business and Human Rights*⁵⁵ with the aim to ensure all businesses including State Owned Enterprises respect human rights. It has focused on five thematic issues identified by stakeholders, namely: Land and Natural Resources; labour rights; revenue transparency; environmental protection; and access to remedy. The *Mwongozo, The Code of Corporate Governance for State Corporations, 2015*⁵⁶ further entrenches principles of corporate governance for government owned entities.

The Nairobi Securities Exchange (NSE) joined the Sustainable Stock Exchange (SSE) in 2021 making a voluntary commitment to solidify its commitment to

⁵¹ Available at

<https://www.centralbank.go.ke/wp-content/uploads/2016/08/BankingActOct2015.pdf> [Last accessed on 22 October 2022]

⁵² Ibid

⁵³ Ibid

⁵⁴ Available at <https://statelaw.go.ke/wp-content/uploads/2020/11/NATIONAL-ACTION-PLAN-ON-BUSINESS-AND-HUMAN-RIGHTS-NOV-2020.pdf> [Last accessed on 22 October 2022]

⁵⁵ Available at

https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf [Last accessed on 22 October 2022]

⁵⁶ Available at <https://www.scac.go.ke/2015-02-16-09-34-58/mwongozo> [Last accessed on 22 October 2022]

transparency and sustainability of markets.⁵⁷ SSE members are required to submit to ESG as a listing rule and at least 36 SSE members maintain sustainability-related indexes.⁵⁸ And the NSE accordingly recently published the *ESG Disclosures Guidance Manual*.⁵⁹

4. ESG & Climate Change Dispute Resolution

4.1 Managing ESG Dispute Resolution:

Environmental conflicts tend to involve a multiplicity of players who are involved either directly or indirectly. In the first instance they may tend to have a multigenerational spectrum involving multiple sources and multiple actors each with their own and diverse viewpoints and understanding on appropriate fair, moral and efficient balance that ought to be struck.⁶⁰ In addition to this such conflicts tend to feature and attract a wide variety of stakeholders including members of the public, various levels of government, private industry, environmental and advocacy organizations as well as affected owners each with resource and power disparities and often a key question that must be addressed is who is to be at the negotiation/conflict resolution table.⁶¹

Environmental conflicts can therefore be challenging, complex and expensive often in highly charged situations with high potential to escalate rapidly. They also compete with other compelling needs such as economic and financial development as well as the demand, supply and availability of essential or

⁵⁷ Sustainable Stock Exchanges Initiative, *The NSE Joins the SSE Derivatives Network*, (23 December 2021)

⁵⁸ Satyajit Bose, Guo Dong, Anne Simpson, *The Financial Ecosystem: The Role of Finance in achieving Sustainability* (2019) Palgrave MacMillan

⁵⁹ Sustainable Stock Exchanges Initiative, *Exchange in Focus: Nairobi Securities Exchange launches ESG Disclosure Guidance and Mandatory Reporting* (3 December 2021)

⁶⁰ Lucia A. Silecchia, *Conflicts and Laudato Si: Ten Principles for Environmental Dispute Resolution* (2017) 33 J Land Use & Env'tl L 61 Available on Heinonline [Last accessed on 21 October 2022]

⁶¹ Ibid

desired goods and services.⁶² In very many ways disputes in this realm embody the political, social, economic, physical and spiritual state of the world and even when they are presented in scientific and technical in legal terms, as they are wont to be, they really are endemic of challenges facing common good as well as the nature of the human condition requiring a holistic approach.⁶³

4.2 ESG/Climate Change Litigation:

There has been a notable increase in climate change litigation with over more than 2,000 lawsuits being filed in different jurisdictions around the world since 2015.⁶⁴ 25% of which were filed in 2020-2021 alone.⁶⁵ Key areas to watch in the immediate future are (1) cases involving personal responsibility of directors & senior management; (2) cases challenging commitments that over-rely on greenhouse gas removals or “negative emissions” technologies; (3) cases focused on short-lived climate pollutants; (4) cases with a climate and biodiversity nexus; and (5) strategies exploring legal recourse for the “loss and damage” resulting from climate change.⁶⁶

Corporate climate change litigation has risen *pari passu* and thus, for instance, Client Earth, an environmental law charity, successfully litigated against the Royal Dutch Shell plc obtaining orders against Shell requiring Shell to reduce its net CO2 emissions by 45% (compared to its 2019 emissions) by the end of 2030

⁶² Ibid

⁶³ Ibid

⁶⁴ Montserrat Manzano & Anna Toimil, *The Role of Arbitration in ESG Disputes* (2022) Von Webeser. Available at https://www.vonwobeser.com/index.php/publication?p_id=1650 [Last accessed on 23 October 2022]

⁶⁵ London School of Economics, Gratham Research Institute of Climate Change and the Environment, *Global Trends in Climate Change Litigation*, (2022) Available at <https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-change-litigation-2022/> [Last accessed on 23 October 2022]

⁶⁶ Ibid

in its operations and the energy-carrying products which it offers for sale.⁶⁷ The Hague District Court based its decision on an unwritten legal principle called “duty of care” and also canvassed UN Guiding Principles for Business and Human rights and the OECD Guidelines.⁶⁸

In the wake of this success Client Earth being a 27% shareholder at Shell further initiated legal action in March 2022 in the United Kingdom against Shell’s board over mismanagement of climate risk by having an inadequate energy plan which does not conform to the Paris Agreement. Client Earth claims this is a breach of the board’s duties⁶⁹ under section 172(1)(d) of the United Kingdom Companies Act, 2006.⁷⁰ The outcome of this case will give a clear direction on what we can anticipate in Commonwealth countries such as Kenya whose Companies Act, 2015⁷¹ is practically word for word that of its UK counterpart.

Client Earth has further sued KLM for issuing false advertisements amounting to “greenwashing” on the grounds that its carbon offsetting scheme gives a false impression of sustainability notwithstanding the pollution these cause. Client Earth claims that these adverts violate European Union consumer law.⁷²

⁶⁷ GK Ganesan, *The rise of ESG – the effect of the 2021 Shell case on global companies* (18 July 2022) Available at <https://www.gkg.legal/the-rise-of-esg-the-shell-case/> [Last accessed on 13 October 2022]

⁶⁸ Ibid

⁶⁹ Ibid

⁷⁰ Available at <https://www.legislation.gov.uk/ukpga/2006/46/introduction> [Last accessed on 13 October 2022]

⁷¹ Available at

<http://kenyalaw.org:8181/exist/rest/db/kenyalex/Kenya/Legislation/English/Acts%20and%20Regulations/C/Companies%20Act%20-%20No.%2017%20of%202015/docs/CompaniesAct17of2015.pdf> [Last accessed on 13 October 2022]

⁷² Victoria Seabroke, *KLM Faces Court Over Greenwashing Adverts and Offsetting Scheme in First Major Challenge to Aviation Industry*, Sky News (24 May 2022) Available at <https://news.sky.com/story/klm-faces-court-over-greenwashing-adverts-and-offsetting-scheme-in-first-major-challenge-to-aviation-industry-12620380> [Last accessed on 13 October 2022]

4.3 The Impact of ESG on Alternative Dispute Resolution:

The emerging Mega Trend of ESG and financial sustainability has created new legal and commercial pressures upon companies, organisations and institutions to move to net-zero and protect workers human rights. New risks have therefore arisen and this requires a new and informed approach to establishing and maintaining contractual relationships. This has seen the emergence of ESG clauses in commercial contracts.⁷³

Legal and commercial pressures on companies to move to net zero and protect workers' human rights have created additional risks, which require overhauling not only internal policies and practices, but contractual relationships as well. As a result, ESG clauses are increasingly finding their way into commercial contracts.⁷⁴ ESG clauses are novel, complex and largely untested, factors that are likely to give rise to disputes about how they should be interpreted and applied.⁷⁵

4.3.1 Arbitration:

With the increased uptake of arbitration, there is a real likelihood that commercial agreements which contain ESG clauses will also boast arbitration clauses particularly on the international level and accordingly such disputes will be referred to arbitration for resolution.⁷⁶

Arbitration for its part is touted to be particularly well suited as (1) it allows parties to choose specialist arbitrators who have the requisite knowledge, experience and track-record;⁷⁷ (2) arbitration further provides a neutral forum with flexible procedural approaches which can be customized to accommodate parties needs and the nature of the dispute at hand; (3) the enforceability of

⁷³ Supra Ibid No.4

⁷⁴ Ibid

⁷⁵ Ibid

⁷⁶ Ibid

⁷⁷ Ibid

arbitration awards on the platform afforded by the New York Convention is a significant benefit which provides commercial certainty.⁷⁸

The ICC *Annual Report of Statistics on Dispute Resolutions, 2020*⁷⁹ identified that construction, engineering and energy disputes, being ESG impact areas, represented the highest number of ICC cases peaking at 38% of all the new cases registered in 2021.⁸⁰ The ICC *Commission Report on Climate Change 2019*⁸¹ for its part identified climate changes disputes amenable to ESG to include (1) contracts for implementation of energy or other systems transition, mitigation or adaptation in line with the Paris Agreement commitments; (2) contracts where a dispute involves or gives rise to an environmental issue; and (3) specific agreements entered into to resolve existing climate change or related environmental disputes, potentially involving impacted groups or populations.⁸²

States are further invoking ESG provisions in trade and investment treaties and proceeding to use these treaties as tools to advance their sustainability objectives. Thus, with effect from 2021 the sustainable investment agreement was birthed breathing life into ESG issues and placing them at the heart of trade and investment policy.⁸³ And though the final print of these treaties with their

⁷⁸ Ibid

⁷⁹ ICC *Dispute Resolution 2020 Statistics*, published in 2021. Available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> [Last accessed on 23 October 2022]

⁸⁰ Supra Ibid No.61

⁸¹ ICC Commission Report, *Resolving Climate Change Related Disputes Through Arbitration and ADR*, 2019. Available at <https://iccwbo.org/content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> [Last accessed on 23 October 2022]

⁸² Kluwer Arbitration, *CBAR21st International Arbitration Conference: Arbitration-Corporate Law-ESG* Available at <http://arbitrationblog.kluwerarbitration.com/2022/10/18/cbar-21st-international-arbitration-conference-arbitration-corporate-law-esg/>. [Last accessed on 23 October 2022]

⁸³ Supra Ibid No.4

attendant dispute resolution mechanisms remain in the works and yet to crystallise in their final form but it is apparent that trade and investment, the environment and human rights will continue to draw closer together⁸⁴ and resolution of disputes via arbitration and ADR appears to be centre stage.

4.3.2 Other Alternative Dispute Resolution Mechanisms:

It is important to note that corporate governance approaches tend to be considered from either of 2 perspectives, that is to say, rules-based or principles-based approaches to regulation in different institutional contexts.⁸⁵ Frequently, both rules based and principles based approaches exist side by side giving greater scope to adopt other non-binding alternative dispute resolution mechanisms such as negotiation, mediation, conciliation, dispute boards, early neutral evaluation, mini-trials and executive or expert tribunals with the primary goal of preventing arbitration and binding dispute resolution mechanisms including investor state disputes.⁸⁶

Thus, organisations subject to ESG Disclosure and Reporting ought to focus on (1) how ESG figures are calculated and expressed; (2) how to appropriately disclose figures; (3) how to identify ESG risks, monitoring of compliance gaps and adoption of appropriate risk management models; (4) drafting general trade terms and policies; (5) drafting general ESG terms and policies.⁸⁷

⁸⁴ Ibid

⁸⁵ Franklin Nakpodia, Emmanuel Adegbite, Kenneth Amaeshi and Akintola Owolabi, *Neither Principles Nor Rules: Making Corporate Governance Work in Sub-Saharan Africa* J Bus Ethics (2018) 151:391–408 article published with open access at Springerlink.com. Available at <https://link.springer.com/content/pdf/10.1007/s10551-016-3208-5.pdf> [Last accessed on 23 October 2022]

⁸⁶ United Nations Conference on Trade & Development, *Investor State Disputes: Prevention and Alternatives to Arbitration* (2010) Available at https://unctad.org/system/files/official-document/webdiaeia20108_en.pdf [Last accessed on 23 October 2022]

⁸⁷ Peter Clemen Christensen & Christina Bach Rasmussen, *ESG Within Litigation and Arbitration*, Lundgrens. Available at <https://lundgrens.dk/en/page/esg-within-litigation-and-arbitration> [Last accessed on 23 October 2022]

5. Conclusion and Recommendations:

Sustainable development and with-it sustainable finance has achieved a primacy and prevalence heretofore unprecedented. A wide variety of players are inexorably involved and the emerging complexities, dynamism and the anticipated volumes will call upon corporate players, regulators and ADR practitioners to craft responsive approaches to dispute resolution as this space continues to grow exponentially. An all hands-on deck approach to creating responsive systems, structures and policies is called for to establish an integrated ESG reporting, compliance and dispute resolution framework in national, regional and global jurisdictions. Specifically, for dispute resolvers a multidisciplinary approach will be called upon for and a more than passing or working knowledge on environmental, social and governance issues will be required.

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Valuing Energy, Price Reviews and The Role of Arbitration in Settling Energy Disputes

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Abstract

Energy valuation is a crucial tool for measuring the viability of investments made in the energy sector on various commodities traded in the market. Valuing energy is complex and constantly changing due to seasonal production changes and even extremely volatile periods. These variations are recognized and the adjustments noted in price reviews. Price reviews allow one party to alter all or a portion of the commodity's contract price to match market prices. However, reviews can be a source of dispute between the parties as they often fail to agree on a reasonable or favorable price. Owing to the complexity of energy contracts, arbitration has become the most suited dispute resolution method as it has proven to be more effective than traditional litigation. This article discusses the causes of price fluctuations, and how these fluctuations can lead to disputes in the energy sector. It also analyzes the importance and features of price review clauses in contracts and how the parties should approach price adjustments. Finally, it espouses on the role of the arbitrator in settling disputes in the energy sector and the categories of disputes in which arbitration is usually applied. This article is based on a literature review conducted through desktop research of topic-related cases, journals, reports and articles. The aim of the work is to illuminate the nexus between price fluctuations, energy

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disputes resulting from the fluctuations and how arbitration can be used to settle such disputes.

Key words: valuing energy, price reviews, arbitration, energy sector, energy disputes

1.0 Introduction

Valuing energy is a systematic way of analyzing the prices of oil and gas, nuclear, utilities, and that of alternative energies to gauge how the companies are faring against their competitors.¹ This helps to assess the company's performance within the energy sector. There are a number of tools utilized by analysts in energy valuation. The first tool is comparing the enterprise value to the earnings before interest, tax and depreciation.² An undervalued company will typically have a low ratio. This method is effective in making transnational comparisons as it does not consider the varying taxes of the jurisdictions of the companies. The second tool is measuring the enterprise value against the barrels of oil produced daily.³ A high multiple compared to the other companies indicates that the measured company is trading at a premium, while a low multiple indicates that it is trading at a discount. This metric does not account for the potential production from undeveloped fields. The third valuation tool is comparing the enterprise value to proven and probable reserves.⁴ This metric is easily calculated as it does not require any assumptions to be made. It is also used where there's scarce knowledge of the company's cashflow.⁵ The fourth tool is analyzing the price against the cash flow per share.⁶ Here, the cash flow alluded to is the operating cashflow excluding the exploration expenses. The final energy valuation tool is comparing the enterprise value against the debt-

¹DW Energy Group, "Oil and Gas Valuation Methods"

² Deloitte, "Overview of business valuation parameters in the energy industry"

³ Ibid

⁴ Ibid

⁵ DW Energy Group, "Oil and Gas Valuation Methods"

⁶ Ibid

adjusted cash flow, which is the sum of the operating expenses and all financial charges such as interest expenses.⁷

On the other hand, price reviews are adjustments that are made to commodity prices in long-term energy contracts.⁸ These adjustments are made so that the prices can reflect the current market trends. Valuation of energy is seasonal and is affected by internal and external factors even beyond the scope of the parties. Normally, energy valuation affects the contractual price in the agreement and the alteration of the valuation may strain the specific performance of obligations by either party.⁹ This is mitigated by inserting a price review clause that allows any party to initiate adjustments of the contractual prices. However, in arbitrating price review disputes, certain issues ought to be noted. First, the party who requested the pricing review is not always the only one who stands to gain from it. With a counterclaim, the respondent may ask for a price adjustment in the opposite direction from what the claimant has asked for.¹⁰ Also, a price review is different from a claim for force majeure or financial hardship. Both of these may co-exist but the difference is the foreseeability factor.

2.0 The Uniqueness of Arbitration in the Energy Sector

Disputes in the energy sector manifest in various ways such as environmental issues, pricing reviews, financing, expropriation, construction and service contract disputes, as well as joint venture disputes. Energy projects are characterized by capital-intensive and complex arrangements that often involve enormous volumes of fossil fuels, nuclear power, or renewable energies like hydro, wind, geothermal, solar, and tidal power. The industry is also heavily impacted by political shifts, environmental legislation, and geological

⁷ BP, "BP Statistical Review of World Energy 2019: Oil Reserve Definitions"

⁸ "Price review clauses in long-term energy contracts"

<https://www.lexology.com/library/detail.aspx?g=6f5f65fa-0e23-4917-b56e-0bfd0e22f322>
accessed 7/10/2022

⁹ Raymund Kovacevic, "Valuation and pricing of electricity delivery contracts: the producer's view"

¹⁰ See the arbitration of Atlantic LNG v. Gas Natural

phenomena. The transactions further involve actors such as states, lenders, and suppliers, all of whom come from different jurisdictions and cultural backgrounds. In addition, energy contracts can pose a political risk that ultimately impacts foreign direct investment. Due to the complexity of these factors, arbitration has emerged as the most efficient and cost-effective dispute resolution method. Arbitrators are also helpful in alleviating the legal burden borne by local courts in highly-sophisticated energy disputes.

Along with the factors espoused above, increased use of funding by third-parties has impacted the application of arbitration in the energy sector. Third-party funding has become a popular means of mitigating financial risk which results in a greater willingness to refer energy disputes to arbitration.¹¹ However, this development has resulted in challenges in regard to allocating costs and protecting legal privilege, which in turn necessitates the proper guidance of a seasoned lawyer.¹² In the English case of *Essar Oilfields Services Limited v Norscot Rig Management Limited (2016)*,¹³ the court held that the successful party could recover costs of third-party funding under the Arbitration Act. This decision has been accepted in most civil law jurisdictions such as France but may not be binding in other jurisdictions.

Energy contracts typically include a dispute resolution clause urging the parties to settle their disagreements through (international) arbitration. Indeed, a key feature of arbitration is that it is capable of settling international disputes as awards can be recognized and enforced by foreign jurisdictions. The process of enforcement is governed by the New York Convention.¹⁴ This feature is

¹¹Mitchelle Cole, "Third Party Funding in International Arbitration" <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---third-party-funding-in-international-arbitration/> accessed 7/10/2022

¹² Ibid

¹³ EWHC 2361

¹⁴ Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958. The awards passed are enforceable in more than 160 countries.

especially crucial for multinational energy companies as it cuts down on the expenses and time required to enforce a foreign judgement in local courts.¹⁵

3.0 Causes of Energy Price Fluctuations

There are several factors that cause fluctuations in energy prices. These include output decisions made by trading blocs like the Organization of the Petroleum Exporting Countries (OPEC),¹⁶ laws of demand and supply, geopolitical disruptions, production costs and natural disasters. OPEC is an intergovernmental organization with one of the largest global oil reserves. It influences price variation by setting production quotas for its members. This has been witnessed recently when OPEC stated that it will slash daily oil production by two million barrels in retaliation to increase in gasoline prices.¹⁷ This measure has elicited negative remarks in the global financial markets, given that countries are already grappling with inflation amidst tough economic times. Despite its enormous influence, the effectiveness of OPEC's measures is still dependent on the following factors: compliance of set targets by member states; consumers' ability to reduce or increase consumption; and competition from non-OPEC oil producers when prices start fluctuating.

The laws of demand and supply provide that an increase in demand for goods, with a corresponding decrease in supply, leads to a rise in prices. Conversely, the inverse of the statement also holds true. This was illustrated in 2014 to early 2016, when oil prices dropped due to reduced demand for petroleum especially in Europe and China, despite increased oil production in the United States.¹⁸ The dramatic plunge in oil prices moved from its peak of \$107.95 a barrel on June 20 2014, to \$44 .08 a barrel by January 28 2015.¹⁹

¹⁵ Corporate Disputes Magazine, "Global Arbitration in the Energy Sector" (January-March 2018 issue)

¹⁶ Organization of Petroleum Exporting Countries

¹⁷ 33rd OPEC and non-OPEC Ministerial Meeting No.30/2022 Vienna, Austria 5/10/2022 https://www.opec.org/opec_web/en/press_room/7021.htm accessed 7/10/2022

¹⁸US Bureau of Labor Statistics, "Beyond the Numbers: The 2014 Plunge in Import Petroleum Prices: What Happened?"

¹⁹ Ibid

Geopolitical disruptions create uncertainty about future supply or demand, which can lead to higher volatility in prices. The inelastic response of supply and demand to short-term price changes is a key factor affecting volatility of oil prices. This is because developing new energy supply sources, switching to alternative fuels or changing production in the near term is a challenge for consumers. To restore physical supply and demand equilibrium, these circumstances might necessitate a significant price change.²⁰ An example of such a disruption is the Russia-Ukraine war. Russia, the largest global exporter of natural gas and the second largest exporter of oil, has been banned from exporting fuel to the European Union (EU), due to its invasion of Ukraine. The ripple effects of this conflict on global energy security have ushered in an increase in the price of gas, oil and other fossil fuels. For instance, due to decreased oil supply, the price per barrel rose to \$114.03 in OPEC, which Russia and Ukraine are not members.²¹ The price of gas also surged from \$2.55 in January 2022 to \$3.27 in July 2022.²² The war has further led to destruction of infrastructure in both countries that has caused the immediate disruption of the logistical supply chain of gas and oil.²³ The cascading effects of the war have been felt locally even though Kenya does not import directly from Russia. This has led to a steady increase in fuel prices and by extension, electricity, transportation, manufactured products in the country.

Production costs have a direct impact on the price of energy products. A higher cost of production and extraction will directly translate to hiked prices to enable the company earn some profit. The onshore Middle Eastern site has consistently been a cheaper area to extract oil compared to the North American shale. This gives the Middle East a huge advantage in the global oil market compared to other areas like Russia and America. It costs about \$27 to extract from the

²⁰ US Energy Information Administration “Oil and petroleum products explained” <https://www.eia.gov/energyexplained/oil-and-petroleum-products/prices-and-outlook.php> accessed 8/10/2022

²¹ KIPPRA, “Russia-Ukraine Conflict and its Effects on Global Energy Security”

²² Ibid

²³ Ibid

Middle East, \$50 from Russia and \$65 from North America. All these countries will then price their oil differently, to cater for the initial production cost.

Natural disasters such as hurricanes, earthquakes, global disease, pandemics and floods equally cause energy prices to fluctuate. Supply and demand shocks from natural catastrophes can have an impact on prices and product availability.²⁴ Supply shocks start when production capacity is destroyed and supply systems are disrupted. Demand shocks are associated with the panic that some customers feel in the aftermath of natural disasters, when they rush to the stores to buy basics and stockpile things they believe will be in short supply in the coming days. The COVID-19 pandemic ushered in high level of uncertainty that saw a greater decline in oil prices than natural gas and heating oil prices.²⁵ This was due to the restricted movement and closing down of factories that ran on energy, resulting in less demand.

4.0 How Price Fluctuations Lead to Disputes

Disputes in the energy sector are nothing short of complex. As aforementioned, these disputes manifest in various ways such as environmental issues, pricing reviews, expropriation, construction and service contract disputes, and joint venture disputes. An environmental issue that may lead to disputes is the transition to sustainable energy through decarbonization, in an effort to mitigate the adverse effects of climate change.²⁶ To achieve this, the way we manufacture and transmit goods and services, generate energy, manage lands, and all other parts of the economy must change. Approaches to decarbonization may vary and the attitude as to what constitutes the appropriate operational adjustments

²⁴ Alberto Cavalli and others, "Price and Supply disruptions during natural disasters." Working Paper 19474

<http://www.nber.org/papers/w19474> accessed 8/10/2022

²⁵ Khalid Khan and others, "Examining the behavior of energy prices to COVID-19 uncertainty: A quantile on quantile approach"

²⁶ Decarbonization entails two limbs. First, reduction of greenhouse emissions produced through combustion of fossil fuels which can be done by using zero-carbon energy renewable sources such as solar, geothermal and hydropower. The second limb calls for capturing emissions to absorb carbon circulating in the atmosphere.

to lessen emission and the costs to ensure compliance with such measures may be a point of contention. The allocation of risk and liability for the effects of such fundamental changes within supply chains and joint ventures is not likely to be well-suited by warranties, indemnities, force majeure clauses, or other contractual terms. With organizations' objectives being articulated differently and on separate schedules, corporate decarbonization programs provide fertile ground for conflicts between commercial counterparties.

Pricing reviews are price adjustments mechanisms common in long-term energy contracts. They ensure that market's fluctuations caused by factors such as wars (Russia-Ukraine conflict) and the COVID-19 pandemic, are continuously reflected in the price of the goods supplied under the contract. With the re-opening of the market post COVID-19 lockdowns, many sellers are expected to push for higher energy prices when contracting.

The legal perspective on expropriation in energy touches on how the host governments may pay investors back, under bilateral and multilateral treaties, for damages incurred as a result of expropriation.²⁷ A host state that is a signatory to the pertinent treaty consents to safeguard the investments made by foreign investors of a signatory state.²⁸ The exceptional feature for such treaties is that they provide the investor with a direct recourse to arbitration against the host party. Expropriation is largely influenced by national interests and this leads to high financing of energy projects acquired by the government. Host countries refer to expropriation of independent energy companies in a bid to lower the prices when a sharp increase is observed. Contracts are negotiated between oil firms and resource-rich nations that outline future tax payments the company will make to the host nation in return for the right to extract hydrocarbons. Due to reduced oil prices, a project that might not have been financially viable can otherwise generate positive tax payments for the nation.

²⁷ George Joffe and others, "Expropriation of oil and gas investments: Historical, legal and economic perspectives in a new age of resource nationalism" *The Journal of World Energy Law & Business* (2009)

²⁸ *Ibid*

Conversely, the oil corporation will ask for a cut of the profits in exchange for high prices. However, governments will be most driven to expropriate and seize all immediate benefits at these exorbitant prices. This creates a conflict between a contract's ability to offer oil price insurance to the host nation and that nation's vulnerability to expropriation risk.

5.0 The Nexus between Energy-Sector Disputes and Arbitration

Price review disputes are not the typical hostile commercial arbitrations which are conducted before tribunals for claim of damages based on purported contract violations. Instead, the arbitral tribunal is called to determine whether the conditions for a price alteration have been met or if the trigger event has occurred; and if so, to decide on the price adjustment. In price reviews, only one element of the contract is varied: the price. The rest of the terms and conditions remain intact so as to ensure continuity. The price review clause and applicable law give the tribunal the mandate to revise contract prices. Arbitrators in these cases must at the very least be familiar with the fundamentals of the energy market, pricing metrics, and transportation costs, but expert testimony is frequently presented.²⁹ The expert evidence adduced by both sides is very essential in the price adjustment; from the fundamentals of the parties' initial contract to guiding the tribunal on the appropriate level of revising the price and how this change can be incorporated into the contract.

Parties may also use arbitration to resolve environmental disputes. These include disputes regarding contamination liability, contractual indemnity, governmental regulation and insurance concerning environmental liabilities.³⁰ Such disputes can only be arbitrated where there is a contract or treaty between the parties referring them to either mandatory, optional or state practice arbitration. Mandatory arbitration usually commences with negotiations. Where this fails, reference can be made to treaties such as UNCLOS³¹ which provides a party with the option to make the treaty compulsory. The second

²⁹ Mark Levy, "Gas Price Review Arbitrations: Certain Distinctive Characteristics (2019)

³⁰ Mark Rosenberg and Michael Cheah, "Arbitrating Environmental Disputes"

³¹ United Nation Convention on the Law of the Seas

option gives parties freedom to decide which dispute resolution mechanism is appropriate for their issue; with the only requirement being that they inform the administrative bodies of the relevant treaty. Treaties with arbitration clauses include the Vienna Convention on the Protection of the Ozone Layer, and the Helsinki Convention on the Trans-Boundary Effects of Industrial Accidents. State practice arbitration on the other hand, leans towards solving disputes by applying to institutions such as the Permanent Court of Arbitration and ad hoc arbitrations. This option provides parties with the freedom to choose their preferred tribunal and hearing process.

Joint ventures are multi-contract transactions used as a means of increasing capital, allocating risk as well as increasing share expertise and technology in developing energy projects. A common type of a joint venture agreement is a joint operating agreement through which the parties assign an operating committee, an operator and detail the parameters of the technical as well as commercial aspects of the contract. The requisite standard of care due by the operator and non-operator parties is normally the source of frequent disagreements in joint operating agreements. Joint ventures with an equitable ratio of 50:50 may experience a deadlock which stalls decision-making. Joint ventures are usually of an international nature, comprising partners from different nations who work across several continents and who are subject to a variety of laws and authorities. In this case, arbitration is seen as a more flexible and unbiased means of resolving the conflict as compared to taking the matter to the domestic court of either party. Parties also have the freedom to decide on the number of arbitrators, applicable law and even the nationalities of the tribunal. In joint venture arbitrations, the parties involved are the business partners or shareholders. The joint venture party is not normally a party to arbitration proceedings unless it was party to the arbitration clause.

Engineering and construction disputes usually arise during the construction phase. Energy-related construction disputes frequently stem from claims relating to time and delay, defects, quality, performance, payments and variation of contracts. These disputes are usually occasioned by high costs,

political pressures, and the highly technical nature of large energy projects. They may also be private in nature or may involve state agencies. Arbitration is often the primary means of solving said disputes because of reasons such as ease of enforcement, confidentiality and party autonomy. A popular body for determining offshore vessels construction disputes is the London Maritime Arbitrators Association. However, this body does not oversee the conduct of its arbitrations in the traditional sense but issues a set of terms which the parties use to conduct their arbitration proceedings. A simple mechanism for establishing a tribunal whose arbitrators are chosen by the parties is provided for under the LMAA Terms. The two arbitrators chosen by each party then appoint a chairperson for the tribunal.

6.0 Importance and Features of Price Review Clauses

The long-term sale of goods agreement between the buyer and seller carries with it a risk unacceptable to both parties. Over a long period of time, structural changes, indexation and natural events can have a significant effect on the initially bargained price and material changes to the competitiveness of that price.³² For instance, reduced regulation, increased supply sources and the global financial crises have led to decreased natural gas prices.³³ Price reviews enable the contract to reflect the current market prices of the commodities. The structure of a price review clause will have these features: a trigger event, the process of arriving at the adjusted price, a description of factors to be considered when altering the price, the consequences if a price agreement is not reached, and a description of how the adjusted price will apply to the contract. These clauses can be explicit and prescriptive in nature as well as non-prescriptive. A buyer will frequently seek to make it as difficult as possible to change the price, but a seller will prefer a formal and binding system to permit price rises.

The trigger event refers to conditions that a party must satisfy when initiating a price adjustment. The trigger event may be set and specified at a time, or may

³² Steve Sparling and others, "Taming price review clauses: Lessons from the transactional and arbitration battlefields"

³³ Ibid

be based on the occurrence of an unspecified exogenous event which may influence the current circumstances of the parties. A dispute is likely to arise when for instance, the trigger event causes the cost of production of energy to significantly vary from the price set when the parties were contracting. This leaves enough room for disagreement as to whether the contingent factors have been satisfied.

The process of arriving at the adjusted price usually begins with negotiations and may even include expert determination or arbitration. Any proceedings during this time may be stayed to allow the parties to reach an agreement. Expert determination differs from arbitration as the former is usually quicker. For instance, similar to court procedures, arbitration may require that evidence be adduced through summons. Unless the agreement specifies otherwise, the experts may make their decision based only on their own experience, without consulting the parties. Generally, it is advised that disputes should be referred to arbitration rather than expert determination where price review requires information to be obtained from third-parties.

The factors that are considered when adjusting price include the type of formula that has been used to calculate the adjustments. The clause may require an 'appropriate' or 'equitable' adjustment, or may expressly provide in great detail the factors that should be considered. Parties seeking a clear and enforceable result should stay away from vague guidelines. A negotiating process with an "equitable" price adjustment leaves a lot of room for misinterpretation and is unlikely to produce a quick adjustment.

In order to ensure that funds can still be paid under the terms of the contract, price review clauses should expressly state what price will apply while the outcome of a price review process is still being determined. An obligation on either the seller to offset any money that the buyer has overpaid if a lesser price

has been established or a buyer to pay off any excess amount resulting from the higher price being determined, should be provided for in a set of guidelines.³⁴ It is crucial to note that price review clauses ought to be drafted and interpreted in context. A price review clause has provisions that are negotiated as part of a wider transaction and should therefore not be construed then applied in isolation. In preparation for an arbitration, it is essential to have information on: what key interests the parties have (security of a high-volume supply, flexibility), each party's negotiating strength, the initial nature of the market when the sale of goods agreement was done, and the adopted positions of the parties after the changes in circumstances and whether one party suggests inclusion of certain words into the clause.³⁵

7.0 Role of the Arbitrator

In energy dispute arbitration, parties may opt for a neutral third party or a tribunal of impartial individuals to settle the dispute. In making the most favorable price adjustment, arbitrators are required to settle on the most appropriate approach. This approach ultimately dictates the arbitrator's determination on the price review. Said approach includes ascertaining whether market conditions were altered throughout the relevant period (the review period) and whether those alterations were permanent and not just transient. The arbitrator then determines if such modifications had an impact on the price of the commodity. The initial steps involve an analysis of the trigger event. Afterwards, the arbitrator makes the necessary changes to the contract sales price so that the new price complies with the price review clause requirements. In order for the price modification to reflect demonstrable changes in the market, the tribunal can attempt to link the price to market fluctuations.³⁶ Here, the arbitrator assesses any differences between the contract price and the

³⁴ Michelle Cole, "Price review clauses in long term energy contracts" (2012) <https://www.lexology.com/library/detail.aspx?g=6f5f65fa-0e23-4917-b56e-0bfd0e22f322> accessed 9/10/2022

³⁵ Steve Sparling and others, "Taming price review clauses: Lessons from the transactional and arbitration battlefields"

³⁶ Steve Sparling and others, "Taming price review clauses: Lessons from the transactional and arbitration battlefields"

prevailing market price. This procedure would have the effect of valuing the change and attempting to reflect it in the new price, as opposed to valuing the commodity anew.³⁷

The arbitrator's role is imposing on the parties, under all relevant circumstances, a reasonable and equitable price. The arbitrator should ensure that whatever approach is taken results in a fair outcome for both parties. The arbitrator is required to preserve as much as possible, the original contract of the parties, save for the alteration of the pricing terms. In determining the adjustment, the arbitrator should not alter any other term of the contract or modify the clauses in a way that renders the price review inapplicable. In making their decision, the arbitrator tries to place themselves in the parties' shoes. The arbitrator considers the intention of the parties in the initial contract and attempts to preserve this intent even in the price review. For instance, if the agreement had intended to allow the buyer to purchase at a competitive or economic price, the arbitrator should strive to ensure this is reflected even in the new price. It is also the role of the arbitrator to reflect specified criteria as accurately as possible. This occurs when the parties had made reference to a certain benchmark to be applied in the review.

8.0 Conclusion

Disputes in the energy sector are influenced by a number of internal and external factors. These factors result in price fluctuations which may be unfavorable to parties in an energy contract, thereby leading to disputes. Arbitration has emerged as the most preferable dispute resolution mechanism due to its flexible and confidential nature, time efficiency, party autonomy and ease of enforceability. Going forward, price review claims are expected to increase as the world adjusts to the re-opening of the global markets and the corresponding shift in energy prices. Initially faced with an economic hardship, most buyers and sellers had to adjust their contracted price to match the low production levels and reduced demand for energy commodities experienced during the COVID-19 pandemic. Similarly, climate change mitigation is

³⁷ Ibid

expected to be another avenue for conflict. With local and international authorities advocating for more sustainable energy sources such as renewable energy, companies are expected to make several changes to their operations. Therefore, arbitration practitioners will need to be more ready than ever to anticipate and adjust to this transition.

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The Place of Environmental, Social and Governance (ESG) in Arbitration

*By: Kariuki Muigua**

Abstract

The paper critically discusses the relationship between Environmental, Social and Governance (ESG) and arbitration. The paper argues that arbitration represents a viable mechanism for managing ESG related disputes while simultaneously promoting ESG tenets. It addresses some of the current concerns in ESG and the ability of arbitration to deal with these concerns. The paper further proposes recommendations towards embracing arbitration in management of ESG disputes for Sustainable Development.

1. Introduction

Environment, Social and Governance (ESG) is a concept that seeks to promote sustainable, responsible and ethical corporate behavior by incorporating Environmental, Social and Governance concerns in corporate decision making¹. The growing threat of climate change and climate crisis has forced many investors to embrace sustainability as a key factor in investment decision-making². Further, social concerns touching on issues such as human rights, diversity, consumer protection and welfare and protection of animals especially endangered species have led to many companies taking their social responsibilities and especially impact of their commercial activities on the local communities where they operate more seriously than ever³. In addition, there

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¹ Stuart. L.G et al., 'Firms and social responsibility: A review of ESG and CSR research in corporate finance.' *Journal of Corporate Finance* 66 (2021): 101889.

² De Francesco. A.J., 'The impact of sustainability on the investment environment.' *Journal of European Real Estate Research* (2008)

³ Cedric.R., 'Accountability of Multinational Corporations for Human Rights Abuses.' *Utrecht Law Review* 14.2 (2018): 1-5.'

has been growing corporate governance awareness since the 2008 global economic recession which has led to increase shareholder and stakeholder activism in demanding more responsive management structure, better employee relations, and reasonable executive compensation in companies⁴.

Consequently, how corporations handle environmental, social and governance issues is increasingly becoming a major concern especially for investors and other key stakeholders. Most investment decisions including assessment and valuation are incorporating ESG criteria with companies that are rated as having strong sustainability programs enjoying more preference from investors⁵.

Matters touching on climate change and sustainability dominate current ESG focus⁶. In addition, human rights and especially the rights of indigenous peoples and governance structures of companies are enjoying prominent attention⁷. Many projects, investors and sponsors are also demanding more detailed identification and mitigation of environmental and social impacts of investment projects before making commitment or funding⁸. The importance of ESG tenets is evidenced by the change in the legal and regulatory landscape to reflect the expectations of investors, customers, employees and other stakeholders⁹.

⁴ Martin.C et al., 'Corporate governance and the 2008–09 Financial Crisis.' *Corporate Governance: An International Review* 19.5 (2011): 399-404; See also Erkens. D.H, et al Corporate governance in the 2007–2008 financial crisis: Evidence from financial institutions worldwide." *Journal of corporate finance* 18.2 (2012): 389-411.

⁵ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Available at <http://kmco.co.ke/wp-content/uploads/2022/07/Embracing-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf> (accessed on 28/09/2022)

⁶ Ibid

⁷ Ibid

⁸ Muigua. K., 'Realising Environmental, Social and Governance Tenets for Sustainable Development' available at <http://kmco.co.ke/wp-content/uploads/2022/07/Realising-Environmental-Social-and-Governance-Tenets-of-Sustainable-Development-Kariuki-Muigua-July-2022.pdf> (accessed on 28/09/2022)

⁹ Ibid

The public scrutiny of corporations and the need to operate within socially acceptable standards have resulted in many corporations incorporating ESG commitments in commercial contracts¹⁰. These commitments can take various forms including respect for the environment, human rights and labour laws.¹¹ ESG related disputes can arise where corporations violate such commitments. Such disputes can be managed through various mechanisms including arbitration.

The paper seeks to discuss the place of Environmental, Social and Governance (ESG) in arbitration. It brings out the nexus between ESG and arbitration. The paper further highlights and discusses the viability of arbitration in management of ESG related disputes. It also proposes interventions towards embracing arbitration in management of ESG disputes for Sustainable Development.

2.0 The Nexus between Environmental Social and Governance (ESG) and Arbitration

Arbitration is form of Alternative Dispute Resolution (ADR) mechanisms. ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation¹². It has been described as a private and consensual process where parties to a dispute agree to present their grievances to a third party for resolution¹³. In Kenya, arbitration alongside other ADR mechanisms has been recognized under the Constitution¹⁴.

It is argued that ESG principles have become a model for sustainable business development through which a corporations' goal for solving environmental,

¹⁰ Von Wobeser., 'The Role of Arbitration in ESG Disputes' available at https://www.vonwobeser.com/index.php/publication?p_id=1650 (accessed on 28/09/2022)

¹¹ Ibid

¹² Muigua. K., 'Settling Disputes Through Arbitration in Kenya' Glenwood Publishers Limited, 4th Edition, 2022

¹³ Ibid

¹⁴ Constitution of Kenya, 2010, Article 159 (2) (c)

social and governance problems is achieved¹⁵. Consequently, ESG considerations have an increasing impact in international business as evidenced by the incorporation of sustainability clauses in investment contracts¹⁶. In such contracts, investors are required to adhere to the concept of sustainable development as envisaged under the contracts and failure to do so may result in ESG related disputes.

In the wake of the climate change debate, there have been calls for responsible business practice towards climate change mitigation through measures such as reduction of carbon emissions¹⁷. The Paris Agreement on Climate Change has raised the awareness of the need for global efforts to combat climate change and the role of responsible and ethical corporate behavior towards achieving this goal¹⁸. Further, corporations are increasingly required to safeguard human rights as envisaged by 'S' pillar of ESG¹⁹.

However, some corporations have been accused of violating these ESG concerns as a result of their business practices. Some corporations have been accused of failing to promote climate change mitigation through reduction of carbon emissions and transitioning to cleaner energy production²⁰. Further, some corporations have been accused of violating fundamental human rights such as the right to a clean and healthy environment especially in the investment sphere in Africa²¹. These instances have resulted in an increasing number of ESG-related disputes.

¹⁵ Mazhorina. M.V., 'ESG Principles in International Business and Sustainable Contracts' available at https://aprp.msar.ru/jour/article/view/3223?locale=en_US (accessed on 28/09/2022)

¹⁶ Ibid

¹⁷ International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' available at <https://www.freshfields.com/en-gb/our-thinking/campaigns/international-arbitration-in-2022/the-rising-significance-of-esg-and-the-role-of-international-arbitration/> (accessed on 28/09/2022)

¹⁸ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

¹⁹ Ibid

²⁰ Ibid

²¹ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' available at <http://kmco.co.ke/wp->

The growth of ESG concerns has seen corporations being increasingly required to embrace ESG principles in their business practices. Consequently, ESG clauses are being adopted in commercial and investment contracts²². In case of violation of such clauses, ESG related disputes are bound to occur. It has been asserted that adoption of ESG-related practices into pre-existing social and governance models adopted by corporations would be disruptive²³. The inclusion of ESG clauses in commercial contracts not only points to the importance of ESG concerns to companies but it also serves as potential source of disputes where such considerations are not complied with²⁴. ESG issues are not only reshaping corporate behavior across the globe but can also be a potential battleground in international disputes²⁵. This creates the need for an effective mechanism of management of such disputes in order to enhance ESG principles in the quest for Sustainable Development.

Arbitration has for a long time been the most viable mechanism for management of international commercial and investment disputes. It offers a neutral forum for the management of disputes and addresses some of the concerns that parties may have in relation to the other parties' legal system²⁶. In international commercial and investment arbitration, parties are reluctant to submit to the jurisdiction of the other party due to the likelihood of favoritism by the host judicial system²⁷. Further, arbitration has the potential of facilitating expeditious

content/uploads/2018/11/International-Investment-Law-and-Policy-in-Africa-AILA-Conference-Paper-5-11-2018.pdf_ (accessed on 28/09/2022)

²² International Arbitration in 2022., 'The Rising Significance of ESG and the Role of International Arbitration' Op Cit

²³ The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at

<https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf> (accessed on 28/09/2022)

²⁴ Ibid

²⁵ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' available at <https://www.whitecase.com/news/media/arbitration-esg-era> (accessed on 28/09/2022)

²⁶ Moses. L.M, 'The Principles and Practice of International Commercial Arbitration' 2nd Edition, 2017, Cambridge University Press

²⁷ Ibid

management of disputes²⁸. In international commercial and investment arbitration, there is need to manage disputes expeditiously in order to preserve the commercial interests of parties.²⁹ The viability of arbitration in management of international commercial disputes is further enhanced by the availability of a legal framework for the recognition and enforcement of foreign arbitral awards. The *New York*³⁰ Convention provides the legal framework for the recognition and enforcement of foreign arbitral awards across different jurisdictions.

Consequently, the adoption of ESG elements in international commercial and investment agreements has resulted in the use of arbitration to manage disputes arising from such agreements³¹. ESG concerns have become prominent in investor-state arbitration with arbitral tribunals having to determine issues relating to climate change, corruption and human rights³². It has been asserted that the growth of ESG will redefine the practice of arbitration as it seeks to adapt to the new concerns created by ESG³³. However, the flexibility of arbitration and its ability to adapt to emerging concerns means that it is well positioned to manage ESG disputes³⁴. However, there is need for reform in order to enhance the role of arbitration in managing ESG disputes.

3.0 Enhancing the Role of Arbitration in Management of Environmental Social and Governance (ESG) Disputes

Arbitration represents a viable mechanism for management of ESG disputes. The following can be done towards enhancing the use of arbitration in ESG disputes:

²⁸Muigua. K., 'Promoting International Commercial Arbitration in Africa' available at <http://kmco.co.ke/wp-content/uploads/2018/08/PROMOTING-INTERNATIONAL-COMMERCIAL-ARBITRATION-IN-AFRICA.pdf>

²⁹ Ibid

³⁰ United Nations Conference on International Commercial Arbitration, 'Convention on the Recognition and Enforcement of Foreign Arbitral Awards' United Nations, 1958

³¹ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³² Ross. A., 'We need talk about ESG' available at

<https://globalarbitrationreview.com/we-need-talk-about-esg> (accessed on 28/09/2022)

³³ Hamilton. J & Coulet-Diaz. M., 'Arbitration & the ESG Era' Op Cit

³⁴ Ibid

3.1 Knowledge in ESG Concerns

Statistics show that many ESG related disputes are being managed through arbitration³⁵. According to the International Chamber of Commerce, engineering, construction and energy disputes represent the highest number of cases handled representing 38% of all cases registered in 2021³⁶. Such disputes entail ESG components such as renewable energy projects, environmental protection and human rights concerns³⁷. This demonstrates that ESG and arbitration are inextricably linked. Arbitration practitioners thus need to equip themselves with knowledge in ESG related matters in order to be better placed to manage ESG related disputes.

3.2 Promoting Sustainable Development

Sustainable Development has been defined as development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs³⁸. This concept entails a combination of elements including environmental protection, economic development and social issues³⁹. The importance of Sustainable Development has seen the adoption of the Sustainable Development Goals as the global blueprint of development⁴⁰. Most of the Sustainable Development Goals entail aspects of ESG such as clean water and sanitation, affordable and clean energy, industry, innovation and infrastructure and climate action⁴¹. Arbitration practitioners should therefore promote the principles of sustainable development when managing ESG related disputes. This could entail requiring investors to comply

³⁵ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

³⁶ International Chamber of Commerce., 'ICC Dispute Resolution Statistics: 2020' available at <https://iccwbo.org/publication/icc-dispute-resolution-statistics-2020/> (accessed on 28/09/2022)

³⁷ Ibid

³⁸ World Commission on Environment and Development, *Our Common future*. Oxford, (Oxford University Press, 1987).

³⁹ Fitzmaurice, M., 'The Principle of Sustainable Development in International Development Law' *International Sustainable Development Law*, Vol. 1

⁴⁰ United Nations., 'Sustainable Development Goals' available at <https://sdgs.un.org/goals> (accessed on 28/09/2022)

⁴¹ Ibid, Goals 6, 7, 9 and 13.

with the host country environmental laws and ESG standards in mining, energy and construction disputes which have an ESG bearing⁴².

3.3 Upholding Human Rights

The 'S' pillar in ESG seeks to promote responsible and ethical corporate behavior through aspects such as respect for human rights⁴³. However, corporate behavior especially in the investment sphere in Africa has resulted in gross violation of human rights⁴⁴. Some corporations which have invested in oil exploration have been accused of human right abuses, environmental degradation and unsustainable peace due to their business culture⁴⁵. In Kenya, a multinational corporation that has invested in the agricultural sector has been accused of human right abuses such as killings, rape, and other forms of sexual and gender-based violence allegedly committed by its guards, bad labour practices and land injustices against the neighbouring communities⁴⁶.

Some of these disputes have ended up in arbitration where tribunals are called upon to adjudicate on human rights issues⁴⁷. Arbitrators should thus seek to uphold human rights in such disputes by rendering awards that are in line with

⁴² The ALP Review., 'The Importance of ESG and its effect on International Arbitration' available at <https://www.alp.company/sites/default/files/ALP%20Review%20-%20The%20Importance%20of%20ESG%20and%20its%20effect%20on%20International%20Arbitration.pdf>

⁴³ Muigua. K., 'Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya.' Op Cit

⁴⁴ Muigua. K., 'International Investment Law and Policy in Africa: Human Rights, Environmental Damage and Sustainable Development' Op Cit

⁴⁵ Maiangwa.B & Agbiboa.D., 'Oil Multinational Corporations, Environmental Irresponsibility and Turbulent Peace in the Niger Delta' Africa Spectrum 2/2013: 71-83

⁴⁶ Kenya Human Rights Commission., 'Heavy price for... egregious human rights violations' available at <https://www.khrc.or.ke/2015-03-04-10-37-01/press-releases/737-heavy-price-for-kakuzi-s-egregious-human-rights-violations.html> (accessed on 29/09/2022)

⁴⁷ Amao. O., 'Corporate Social Responsibility, Human Rights and the Law: Multinational corporations in Developing Countries.' Routledge, 2011.

human rights standards⁴⁸. By promoting human rights, arbitrators will be embracing the 'S' pillar that is fundamental in the ESG debate.

3.4 Promoting Good Governance

The Governance pillar in ESG seeks to achieve good financial and accounting standards as well as legal and regulatory compliance, such as transparency, corporate structures and ethics in corporate conduct⁴⁹. It also seeks to align Governance with the Sustainable Development Goals where governance issues include industry, innovation and infrastructure (Goal 9); peace, justice and strong institutions (Goal 16); and partnerships with public and private institutions (Goal 17)⁵⁰. Good governance can be promoted through arbitration by rendering awards that adhere to good governance practices such as transparency, accountability, reporting and disclosure.

3.5 Seeking Expert Assistance in Complex ESG Matters

Arbitration has a significant role in promoting ESG tenets in areas such as climate change. Arbitrators play a significant role in shaping and adapting international law to respond to the climate crisis⁵¹. However, in some instances, arbitration has been slow to act in response to the climate crisis⁵². Some climate change concerns such as determining adherence to climate change commitments through low carbon transition requires arbitrators to be fully informed and engaged in such concepts⁵³. This may require expert analysis and

⁴⁸ Krajewski, M. 'Human Rights in International Investment Law: Recent Trends in Arbitration and Treaty-Making Practice.' Available at SSRN 3133529 (2018).

⁴⁹ RL360, "Governance-The G in ESG," Available at: <https://www.rl360.com/row/funds/investment-definitions/g-in-esg.htm> (accessed on 29/09/2022)

⁵⁰ Sustainable Development' available at <https://sdgs.un.org/goals> (accessed on 29/09/2022)

⁵¹ Greenwood. L., 'The Canary is Dead: Arbitration and Climate Change' *Journal of International Arbitration*, Volume 38, Issue 3 (2021)

⁵² Ibid

⁵³ Miles. W., 'BVI: A Frontline Focus for Resolving Future Climate Change Related Disputes' available at

guidance from persons with requisite knowledge in environmental matters⁵⁴. Arbitrators should therefore seek expert assistance in such issues in order to be fully informed and render awards that promote ESG principles.

4.0 Conclusion

The relationship between Environmental, Social and Governance (ESG) and arbitration continues to grow. Adoption of ESG by corporations as a means of promoting responsible and ethical business practices and the wide use of arbitration in management of international commercial and investment disputes points to increased use of arbitration in management of ESG related disputes⁵⁵. In managing such disputes, arbitrators should promote ESG considerations whilst balancing the needs and interests of parties involved in issues such as climate change⁵⁶. Arbitration represents a viable mechanism for managing ESG disputes while simultaneously promoting Sustainable Development. There is need to enhance the viability of arbitration in management of ESG related disputes.

https://www.bviiac.org/Portals/0/Files/Publications/Wendy%20Miles%20QC_BVI_A%20Frontline%20Focus%20for%20Resolving%20Future%20Climate%20Change%20Related%20Disputes.pdf (accessed on 29/09/2022)

⁵⁴ Cummins. T et al., 'ESG Litigation - How Companies Can Get Ready, Respond and Resolve Claims' available at <https://www.emerald.com/insight/content/doi/10.1108/JOIC-07-2021-0032/full/html> (accessed on 29/09/2022)

⁵⁵ Von Wobeser., 'The Role of Arbitration in ESG Disputes' Op Cit

⁵⁶ Ibid

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Privacy and Confidentiality in Investor-State Arbitration Proceedings: The Abaclat Case

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Abstract

Privacy in arbitration does not necessarily suggest confidentiality. This article uses a case study approach to explore how this controversial puzzle unraveled in the Abaclat Case, when anatomized through the lens of existing literature. Overall, the study revealed that in issuing Procedural Order no. 3, the mammoth occupation for the Abaclat Tribunal, really, was to uphold transparency considerations in a manner that did not compromise the integrity of the arbitration proceedings. Chiefly, study findings suggest that ambiguity and the gaps in current Conventions and arbitration Rules on transparency are triggers for potential perpetual debate among contending parties. It is recommended that future legislative text be sharply refined in the area of transparency and confidentiality in treaty-based investor-state arbitration, as the tidal currents of the transparency movement are increasingly shifting away from express transparency and toward implied transparency.

Keywords: Abaclat Case, Confidentiality, Privacy, Treaty-based investor-state Arbitrations

1. Introduction

In principle, whereas arbitration is private, it is not necessarily confidential.¹ More recently, this highly debated paradox unfolded when the full Hearing on annulment in the case of (DS)2, D.A., Peter de Sutter and Kristof de Sutter versus Republic of Madagascar (ICSID Case No. ARB1718) was made public via the

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¹ Schmitz, Amy J. 2006. "Untangling the Privacy Paradox in Arbitration." *University of Kansas Law Review* 54, no. 5 1211-1254.

organizations YouTube channel in November 2021.² This raises the question: Are public arbitration proceedings the future, especially where State parties and public funds are involved? Where do arbitral proceedings draw the line between upholding privacy and confidentiality on one hand, and enhancing transparency on the other?

The purpose of this article is to draw on existing research about privacy and confidentiality in Arbitration. Attention is drawn to the kinds of questions other scholars have raised in this subject, how they've answered those questions, and how they have tested or supported their answers. Having appropriated past research in this area, this study then specifically narrows down to an exploration of the *Abaclat Case*³, a prime case law precedent, which extends research by testing existing answers in new ways. This case is significant because, similar to the *Biwater Case*, the arbitral Tribunal issued procedural orders specifying the conduct of confidentiality in the matter. The lessons drawn from the *Abaclat Case* are useful in informing policy decisions in the transparency reform movement.

This paper is organized in five sections. The second section details existing literature by scholars under three distinct sub-themes: arbitration rules in investor-state dispute settlement, third-party intervention in investor-state Arbitration, and lastly transparency and confidentiality in international arbitration. Section three features the case *Abaclat and others versus Argentina*, a dispute involving debt owed to Italian bondholders by Argentine referred to an ICSID arbitration. Claimant and Respondent positions are explained, and the Tribunal's reasoning behind issuing Procedural Order No. 3, a confidentiality order is outlined. Section four discusses implications of case precedent for policy, and specifically the general shift in practice towards an implied

² International Centre for Settlement of Investment Disputes. 2021. *ICSID Resources*. November 10. Accessed February 19, 2022.
<https://icsid.worldbank.org/resources/multimedia/ds2-sa-p-de-sutter-and-k-de-sutter-v-republic-madagascar-icsid-case-no-arb1718>.

³ *Abaclat Case*, Procedural Order No 3 dated January 27 2010

transparency, which previously did not exist. This paper concludes with a projected overview for potential future research in the subject matter.

2. Literature Review

2.1 Arbitration Rules in Investor-State Dispute Settlement

Investor-state arbitrators are often subject to, among other procedural Rules, the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules adopted in 1976 and revised in 2010, the International Center for Settlement of Investment Disputes (ICSID) Rules of Procedure for Arbitration Proceedings, and the Permanent Court of Arbitration (PCA) Rules issued in December 2012.⁴ The set of scholars under this sub-theme share commonalities in their approach which reviews the unique aspects of these procedural Rules to the extent that they inform transparency in investor-state arbitrations.

In the past, treaty agreements have been faulted as being vague concerning the subject matter of confidentiality when resolving investor-state disputes. In a 2001 article attempting to demystify the uncertainty surrounding the public release of documents submitted to, or issued by, a Chapter Eleven tribunal convened to resolve an investor-state dispute, the main question interrogated by the scholars was how NAFTA governments interpreted, clarified, and reaffirmed the issue of confidentiality.⁵ In a separate article, there was general consensus that the forms and applications of transparency standards under UNCITRAL rules were indeed debated amidst a flurry of policy considerations. Additionally, this foregoing research also sought to explain the forms and application of standards which best achieved the Commission's objective in

⁴ Vasani, Baiju S., Sylvia Tonova, and Anastasiya Ugale. 2013. "Arbitration Rules for Dispute Resolution Involving States and State Entities: What are the Significant Differences?" *The International Lawyer* vol. 47, no. 2 163-175.

⁵ American Society of International Law. 2001. "Confidentiality of NAFTA Chapter 11 Proceedings." *American Journal of International Law* 95, no. 4 885-887. <https://doi.org/10.2307/2674641>.

promoting greater transparency in investor-state arbitrations.⁶ The overall impression derived by these scholars was that erstwhile, the instruments of transparency have been very unclear. Conclusively, the overarching determination was that under the UNCITRAL rubric, party consent and autonomy should still be preserved and consistency should be upheld when applying new transparency standards.⁷

Other scholars set an objective to review the neoteric editions of the different international arbitration Rules, felicitous to arbitrations involving states and state entities. Theirs was a comparative approach which explored the ways in which the UNCITRAL Rules, ICSID Rules, and PCA Rules compare. Results of this research approach revealed that despite the fact that businesses, investors, and states had a variety of arbitration options dedicated to their disputes, ICSID rules were the most transparent for public arbitrations because of the institutions self-contained system of review, recognition, and enforcement of ICSID awards.⁸ On the other hand, a parallel study investigated how UNCITRAL Rules on Transparency and the UN Convention on Transparency altered the structure of international investment arbitration as well as its relationship with other regimes of international law. The outcome of this research disclosed that Rules and Conventions do modify significantly the structure of investment treaty arbitration.⁹

To test their arguments, some scholars utilized a case-by-case comparison of tribunal proceedings in different disputes such as the *Metalclad* case, the *Loewen*

⁶ Lee, Julie. 2013. "UNCITRAL's Unclear Transparency Instrument: Fashioning the Form and Application of a Legal Standard Ensuring Greater Disclosure in Investor-State Arbitrations." *Northwestern Journal of International Law & Business* 33, no. 2 439-474.

⁷ Ditto

⁸ Vasani, Baiju S., Sylvia Tonova, and Anastasiya Ugale. 2013. "Arbitration Rules for Dispute Resolution Involving States and State Entities: What are the Significant Differences?" *The International Lawyer* vol. 47, no. 2 163-175.

⁹ Shirlow, Esme. 2016. "Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration." *ICSID Review: Foreign Investment Law Journal* 31, no. 3 622-654.

case, and the *Methanex* case.¹⁰ Others focused on comparative analysis of the three different procedural Rules from a policy perspective.¹¹ Another different test detailed the evolution of transparency prior to the UNCITRAL Rules and the UN Convention on Transparency, its growing convergence, and the future promise of the Rules with investment treaty arbitration.¹²

The culmination of research by authors under this sub-theme of arbitration Rules in investor-state dispute settlement suggests two fundamental ideas. First is that, the perception and characterization of the functions and disposition of investment arbitration is very much linked to impacts arising from Rules and Conventions in investment treaty arbitration. The second idea is that there isn't a dearth of investment treaty arbitration options available to investors and states, each with specific guidelines on transparency and confidentiality. In principle, parties have autonomy when deciding what Conventions and Rules will govern their disputes both substantively and procedurally. The next subsection outlines literature by those authors who have studied third-party intervention in investor-state arbitration.

2.2 Third-Party Intervention in Investor-State Arbitration

The transparency movement is driven by non-governmental organizations (NGOs) and argues that arbitration—a private method of dispute settlement—is an inappropriate means of adjudicating disputes involving sovereigns.¹³ The body of research in this second section is by a set of authors who coincide in

¹⁰ American Society of International Law. 2001. "Confidentiality of NAFTA Chapter 11 Proceedings." *American Journal of International Law* 95, no. 4 885-887. <https://doi.org/10.2307/2674641>.

¹¹ Vasani, Baiju S., Sylvia Tonova, and Anastasiya Ugale. 2013. "Arbitration Rules for Dispute Resolution Involving States and State Entities: What are the Significant Differences?" *The International Lawyer* vol. 47, no. 2 163-175.

¹² Shirlow, Esme. 2016. "Dawn of a New Era? The UNCITRAL Rules and UN Convention on Transparency in Treaty-Based Investor-State Arbitration." *ICSID Review: Foreign Investment Law Journal* 31, no. 3 622-654.

¹³ Tieltelbaum, Ruth. 2010. "A Look at the Public Interest in Investment Arbitration: Is it Unique - What should we do about it." *Publicist* 5, no. 1 54-62. Author argues against transparency movement's evasion of distinct public & private arbitration.

their approach to address the interposition of third-parties to the extent that they infringe on privacy in investor-state arbitrations.

Focusing decisively on the *amicus curiae*¹⁴ matter at the World Trade Organization (WTO) Appellate Body, a 2004 article interrogated whether the Appellate Body has the power to receive and consider *amicus curiae* briefs in four different cases, or whether this role should be assigned to panels. One important revelation from this article was that the employment of amicus briefs introduces heavy cost implications and serious risks of litigation especially for under-resourced or poor governments which cannot properly make their case in investment arbitration.¹⁵ Further, a separate investigation was conducted to establish whether or not it was realistic to expect that an arbitral tribunal would assess the representability of an NGO. In this case, it was necessary to understand how the tribunal decides whether or not to authorize an applicant to file an *amicus curiae* brief and whether this admission upholds the rules of transparency and fairness.

The researcher's conclusion was that the trend towards admission of *amicus curiae* briefs as part of transparency reform was unsatisfactory from both a procedural and substantial point of view. Substantially, this researcher was unable to reconcile the admission of *amicus curiae* briefs as driven by public interest against the tribunals residual power to authorize the said admission but only in the absence of an agreement by the parties.¹⁶ Scilicet, ICSID Rules were

¹⁴ An *amicus curiae* is, according to Black's Law Dictionary, "a person with strong interest in or views on the subject matter of an action, who may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views." Adopted from (Mourre 2006).

¹⁵ Matsushita, Mitsuo. 2004. "Transparency, Amicus Curiae Briefs, and Third party Rights." *Journal of World Investment & Trade* 5, no. 2 329-348. Author argues that this is a system which is halfway between a political and a legal system.

¹⁶ Mourre, Alexis. 2006. "Are Amici Curiae the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?" *The Law and Practice of International Courts and Tribunals* 5 257-271 Author suggests that admission of amicus curiae briefs is unsatisfactory from both procedural and substantial points of view. Expressed disappointment in the agreement for changes in ICSID Rules.

limited in addressing how hearings could potentially be open to third-party while simultaneously being subject to the consent of the parties.

There are those who believe that the transparency movement has been undoubtedly a success based on the 2006 amendments to the ICSID Arbitration Rules which provides that unless otherwise objected by parties, the tribunal may allow third-parties to attend or observe all or part of the hearings subject to sufficient logistical accommodation.¹⁷ To this end, one scholar interrogated the questions: Where does the transparency movement draw the line between public and private adjudication? Does it follow that the public interest in investment arbitration is unique only because a State is involved? The research by this author concluded in the affirmative. Enhanced transparency procedures do indeed blur the intersection between private and public adjudication. This is because, by circumventing the dubiety of whether a State's regulatory power should be arbitrated (for example in environmental disputes), NGOs, arbitrators, and arbitration institutions give investment treaty arbitration more legitimacy to adjudicate the very issues the transparency movement claims ought not to be arbitrated to begin with.¹⁸ Distinctively, a kindred scholar attempted to bridge the gap between (public) substance and (private) procedure in investment treaty arbitration by arguing that investment treaty arbitration tribunals should utilize *amicus curiae* submissions in order to incorporate neglected perspectives of the issues raised in arbitration.¹⁹

With increasing diversification of third parties seeking amicus standing also comes complexity regarding the constitution of interests these third parties may represent. Researchers have interrogated whether arbitration regimes have the potential to strike an appropriate balance between maintaining the key features of the arbitral institution and allowing relevant third-party input. One such

¹⁷ ICSID Arbitration Rule 32(2)

¹⁸ Tieltelbaum, Ruth. 2010. "A Look at the Public Interest in Investment Arbitration: Is it Unique - What should we do about it." *Publicist* 5, no. 1 54-62.

¹⁹ Ishikawa, Tomoko. 2010. "Third Party Participation in Investment Treaty Arbitration." *International and Comparative Law Quarterly* 59, no. 2 373-412. Author argues in support of consideration of amicus curiae briefs in ISDS

investigation drew on existing cases to detail the rationale for third-party intervention in investment arbitration and also traced recent developments in *amicus* participation in investment arbitration and the institutional changes that have permitted greater third-party involvement. It was evident from this study that there isn't currently a formalized or predictable process to address the give and take surrounding third-party involvement in investment arbitration.²⁰

On a more reflective approach, an allied but critical scholar poked at speakers and writers who tackled the topic of investment-treaty arbitrations as distinct from commercial arbitration based on three different lines of contrast: a tidy librarian's dimension, a territorial dimension, and an analytical dimension. In a final assessment, this researcher introduced a fourth proposition of the perceived contrast around arbitration created by treaty, which he called the battle line - the idea that *'international disputes involving matters of public interest should only be charged to bodies with international civil servants or direct State appointees, or that all awards arising out of investment-treaty arbitrations should be determined by an appellate body before which the only contestants will be States - and any temporarily victorious private party would be left with the timorous hope that its own foreign ministry will feel that it's in its government's interest to defend the initial award.'*²¹ [Emphasis added].

The climax of research by authors under the sub-theme of third-party intervention in investor-state Arbitration was characterized by heavy reliance on qualitative case precedent when testing arguments. Some notable cases included *Aguas del Tunari versus Methanex*²², *UPS*, and *Vivendi*. The main take-

²⁰ Levine, Eugenia. 2011. "Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation." *Berkeley Journal of International Law* 29, no. 1 200-224. Author suggested also that acceptance of amicus curiae briefs could scare investors from arbitration.

²¹ Paulsson, Jan. 2012. "The Public Interest in International Arbitration." *American Society of International Law Proceedings* 106, no. 1 300-304. Author introduced a 4th dimension to the contrast around treaty arbitration - the battle line!

²² In a separate *Methanex case*, the Claimant submitted that there was no need to admit the amici's intervention, as any party could call them as witnesses. Concerns were raised on accounts of legitimacy and fairness.

away from this literature is that whereas the involvement of third-parties in investor-state arbitration advances the transparency movement, there is still a lack of a formal structure for which their interests and contributions can be hewn into the investment arbitration process. The next sub-section outlines transparency and confidentiality in international arbitration.

2.3 Transparency and Confidentiality in International Arbitration

Arbitration involves “privatization” of the law.²³ However, since the 1965 Washington Convention, a trend toward recognition of foreign investors’ right to bring action directly against foreign host States has emerged, and with it came concerns about transparency and fairness to third-parties from arbitral proceedings when compared with rights recognized to them in domestic law.²⁴ This section blends authors whose works correspond on transparency, privacy and confidentiality in international arbitration.^{25, 26, 27, 28, 29} Jointly, the recurring themes and questions examined ways to protect the legal interest of third parties

²³ Schmitz, Amy J. 2006. "Untangling the Privacy Paradox in Arbitration." *University of Kansas Law Review* 54, no. 5 1211-1254. An article on the confusion surrounding differing aspects of confidentiality and privacy in arbitration

²⁴ Lazo, Rodrigo Polanco. 2010. "International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes." *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 104. Cambridge University Press. 591-595.

²⁵ Collins, Michael. 1995. "Privacy and Confidentiality in Arbitration Proceedings." *Texas International Law Journal* 30, no. 1 121-134.

²⁶ Knahr, Christina, and August Reinisch. 2007. "Transparency versus Confidentiality in International Investment Arbitration - The Biwater Compromise." *The Law and Practice of International Courts and Tribunals* 6 97-118. Authors dissected the Biwater Gauff Compromise based on transparency vs confidentiality

²⁷ Crook, John R. 2009. "Joint Study Panel on Transparency in International Commercial Arbitration." *ILSA Journal of International & Comparative Law* 15, no. 2 361-366.

²⁸ Magraw Jr., Daniel Barstow, and Niranjali Manel Amerasinghe. 2009. "Transparency and Public Participation in Investor-State Arbitration." *ILSA Journal of International & Comparative Law* 15, no. 2 337-360.

²⁹ Lazo, Rodrigo Polanco. 2010. "International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes." *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 104. Cambridge University Press. 591-595. Author compares a culture of secrecy in investor-state arbitrations as distinct from BITs.

or the overriding public interest in investor-state arbitration, the concepts hidden behind transparency – whether as a moral choice, or as a way to increase transaction costs. In crafting transparency policy, literature reveals that it is important how such policy should evolve – whether through contract drafting, revision of institutional arbitral rules, or through the development of legislative mandates.

The premise that arbitration should be conducted in private denotes that, strangers should be precluded from hearings and other arbitral proceedings. One such researcher interrogated whether the impression of privacy therefore prohibits the use, for any purpose barring the arbitration itself, of material prepared for the arbitration or disclosed by one party to the other in the span of the arbitration. To achieve a solid balance between the conflicting interests of the parties involved in arbitration proceedings therefore, this scholar recommended the English approach which differentiates between the award (and reasons) on one hand, and the raw materials used in arbitration, otherwise.³⁰ In a study akin to the foregoing, a like-minded scholar recommended that to untangle the privacy paradox in arbitration – where arbitration is deemed private but not confidential – parties ought to draft their contracts more carefully, while policy makers should craft transparency reforms which consider the tensions created by this paradox.³¹

Literature also presented research by authors who went further to paint international perspectives on transparency in international investment law as a set of norms to be upheld. Distinct from commercial arbitration, international arbitration elevates privacy to the extent that arbitral hearings are closed to the public, awards are typically not published, and when published they are usually redacted.³² One such scholar introduced a currently thriving concept of ‘blind

³⁰ Collins, Michael. 1995. "Privacy and Confidentiality in Arbitration Proceedings." *Texas International Law Journal* 30, no. 1 121-134.

³¹ Schmitz, Amy J. 2006. "Untangling the Privacy Paradox in Arbitration." *University of Kansas Law Review* 54, no. 5 1211-1254.

³² Marris, Scott, and Martin Beirne. 2015. "International Perspectives on Arbitration Confidentiality." *Defense Counsel Journal* 76-79.

spot justice' in international commercial arbitration where private parties resolve disputes that affect issues of public policy such as environmental protection, public health and safety, and market competition without public notice. Arising from this study, this author therefore called for extensive transparency in international commercial arbitration first, before pushing for transparency reforms in investor-state arbitrations.³³

Research also shows that transparency is a reflection of the sources, stakeholders, and structures of investment arbitration. To support this, an agreeable researcher described how transparency manifests at the points of norm-making, as a substantive investment obligation, and as a procedural requirement in the application of these norms by investment treaty tribunals.³⁴ Parallel to this, a kindred scholar also observed that adopting evenness between transparency and confidentiality would look like establishing public disclosure as the general rule while permitting exclusions for confidential information.³⁵

Collectively, the research by authors under this sub-theme of transparency and confidentiality in international arbitration presents these lessons. Chiefly, arbitrators must be careful when navigating the slim divide that demarcates the obligation for confidentiality and privacy in investor-state arbitration from the exigencies of expansive public involvement in matters of public policy. Secondly, policy makers ought to draft transparency reforms that reflect this paradox for which both disputing parties in investment arbitration and the public at large face. Third, the character of disputes which end up in investor-

³³ Argen, Robert D. 2014. "Ending Blind Spot Justice: Broadening the Transparency Trend in International Arbitration." *Brooklyn Journal of International Law* 40, no. 1 207-246. Author introduced new perspectives on ending what the research termed as 'Blind Spot Justice'

³⁴ Shirlow, Esme. 2017. "Three Manifestations of Transparency in International Investment Law: A Story of Sources, Stakeholders, and Structures." *Goettingen Journal of International Law* 8, no. 1 73-99.

³⁵ Zhao, Mary. 2020. "Transparency in International Commercial Arbitration: Adopting a Balanced Approach." *Virginia Journal of International Law* vol 60, no. 1 175-218. Author attempted to create a case for a balanced approach to transparency in international arbitration.

state arbitration by-and-large predisposes the arbitral proceedings to probe by the members of the public. Typically, these include matters of resource nationalism, public health, or public funds.

Based on the comprehensive review of literature under section two and in an attempt to apply the lessons learned, the next section focuses on a case precedent, *Abaclat and others versus Argentina*, which is very central in the debate about privacy and confidentiality in treaty-based investor-state arbitrations.

3. *Abaclat and others versus Argentina*

Under the ICSID Convention, Tribunals have exercised their discretion in adopting diverse levels of confidentiality for different documents. Two most notable cases are the *Biwater Gauff Limited versus Tanzania* and *Abaclat & Others versus Argentina*.³⁶ Particularly, the *Biwater* decision³⁷ involved a highly politicized reference between a UK company Biwater Gauff and the Republic of Tanzania over a water privatization dispute. This matter was significant on account of the tribunal's contemplation of the competing interests of increasing transparency, on one hand, and the charge to uphold procedural integrity, otherwise.³⁸ This case was the first of its kind in dealing directly with transparency and confidentiality.

Researchers who have studied the *Abaclat* matter³⁹ viewed it by dint of mass claims in investment arbitration. Observation has been made that this case was unprecedented because it was the first decision to hold that a tribunal has jurisdiction to hear claims over a sovereign's default and debt restructuring,

³⁶ Bansal, Ritika. 2021. "Need for Implied Transparency in Investment Arbitration." *International Law and Politics* 221-233. Cited from p. 229.

³⁷ *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22

³⁸ Knahr, Christina, and August Reinisch. 2007. "Transparency versus Confidentiality in International Investment Arbitration - The Biwater Compromise." *The Law and Practice of International Courts and Tribunals* 6 97-118. Cited from p. 98.

³⁹ *Abaclat and Others versus Argentine Republic*, ICSID Case No. ARB/07/5 (formerly *Giovanna A Beccara and Others versus The Argentine Republic*)

where a bilateral investment treaty existed.⁴⁰ Notably, this unparalleled large-scale arbitration arose out of Argentina defaulting on its national debt to Italian bondholders and the case had by far the largest count of petitioners – sixty thousand.⁴¹

More recently, research submits that the tribunal in *Abaclat* held the arbitral proceedings as ‘hybrid’, conceding that the claims were brought as aggregate, and the representative element of the process meant that the claimant’s interests could not be considered individually.⁴² While appreciating the input of previous researchers, the current study now attempts to modestly review the *Abaclat Case* purely from the perspective of the Tribunal’s Procedural Order No. 3 which,⁴³ just like in the *Biwater Case*, was a confidentiality order. This departure from the established scholarly theme of mass claims in investment arbitration is imperative to inject a fresh approach in the transparency debate which has previously not been done with reference to the *Abaclat* case.

3.1 The Dispute

Pursuant to the May 1990 Agreement between the Republic of Argentina and the Republic of Italy on the Promotion and Protection of Investments (hereinafter “Argentina-Italy BIT”), bonds were issued by the Argentina (hereinafter “Respondent”) on which payment was defaulted. By December 2001, the external bond debt, owed to both non-Argentine and Argentine creditors (hereinafter “Claimant”) amounted to over US\$ 100 billion. While restructuring the debt, an Exchange Offer was launched in January 2005 and

⁴⁰ Chrostin, Jessica Beess und. 2012. "Sovereign Debt Restructuring and Mass Claims Arbitration before the ICSID, the *Abaclat Case*." *International Law Journal* 53(2).

⁴¹ Strong, S. I. 2014. "Consent in Multiparty Investment Arbitration - The Most Recent Installment." *Kluwer Arbitration Blog*. December 11. Accessed April 14, 2022. <http://arbitrationblog.kluwerarbitration.com/2014/12/11/consent-in-multiparty-investment-arbitration-the-most-recent-installment/>

⁴² Radovic, Relja. 2020. "Adamakopoulos and Others v. Cyprus: Mass Claims Between No Longer and Not Yet." *Blog of the European Journal of International Law*. April 10. Accessed April 14, 2022. <https://www.ejiltalk.org/adamakopoulos-and-others-v-cyprus-mass-claims-between-no-longer-and-not-yet/>

⁴³ *Abaclat Case*, Procedural Order No 3 dated January 27 2010

bondholders were invited to exchange existing series of bonds where Argentina had suspended payments, for new debt that Argentina would issue. By the wrap-up of the duration for submitting tenders pursuant to the Exchange Offer, 76.15% of all holdings participated. The issue in dispute therefore was that the affected Claimants did not partake in the Exchange Offer and therefore claimed compensatory damages concerning their bonds.

3.2 Party Positions

When the Respondent advanced an offer of ICSID arbitration to each Italian national bondholder, data and documentation was collected and compiled in a database from each individual to include a proclamation of assent to ICSID arbitration, deputation of authority, power of attorney, bondholder's identity, nationality, residency, and proprietorship of bonds. However, when tendering their Request for Arbitration, the Claimants submitted only partial information but excluded the nationality of the Claimants. Citing Article 48(5) of the ICSID Convention and Rules 15 and 32(2) of the ICSID Arbitration Rules, while the Claimants were amenable to giving the Respondent access to all Claimant data, they first demanded that the Respondent enacts an appropriate Confidentiality Agreement to fortify the privilege of Claimant's personal data. The rationale behind this was that ICSID's legal framework did not dispense for the 'requisite confidentiality for Claimant's data' and parties were therefore within their rights to conclude such a bargain or for ICSID Tribunal's to order parties to do so.

Further, the Claimant was concerned because the Respondent, when submitting its "Supplemental Exhibits" in 2009, provided a bundle of twenty-one expert judgements and transcripts from other treaty arbitrations where Argentina was involved. This was allegedly a blatant disregard for the privilege protections.⁴⁴ Additionally, as to the confidentiality of the proceedings, the Claimants were suspicious that the Respondent leaked the details of the ongoing case in reference to the press.

⁴⁴ Abaclat Case, Procedural Order No 3 dated January 27 2010 p. 16

The Respondent, on the other hand rejected all Claimant's requests for privilege protection citing that the Claimants had an overriding charge to provide a 'well-organized archive of Claimant data and documentation', a responsibility which could not be made conditional upon technical demands such as a Confidentiality Agreement. The Respondent agreed only to be bound by the confidentiality obligations delineated in the ICSID Convention and ICSID Arbitration Rules. As to its "Supplementary Exhibits", the Respondent felt that none of the twenty-one expert judgements from other ongoing arbitrations were filed in a sealed proceeding, but rather were presented in full, not 'selectively' or 'out of context'. In principle, it was the Respondent's frame of reference that there was 'no general rule of privilege regulating ICSID arbitration proceedings or a confidentiality rule felicitous to the series of documents set forth by Argentina. Consequently, the Respondent drafted a counter-alternative of the confidentiality agreement to their own preference.⁴⁵

3.3 Tribunal's Position

In issuing Procedural Order No. 3, the Tribunal substantively took into account its legal power to rule on confidentiality. In their submissions, this power had neither been addressed by the Claimant nor had it been contested by the Respondent. Therefore, the Tribunal, in exercising thoroughness and transparency, drew upon Article 47 of the ICSID Convention and Rule 19 (1) of the ICSID Arbitration Rules. Article 47 of the ICSID Convention stated that: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve rights of either party." Rule 19 of ICSID Arbitration Rules provides that: "The Tribunal shall make the orders required for the conduct of the proceeding."

Further, the Tribunal conceded that with regard to discreetness issues in international investment arbitration, no homogeneous practice existed. In some postulations, either 'orders' or 'provisional measures' were used, while in other pleas, a combination of both. Therefore, as for the Claimant's request to establish

⁴⁵ Abaclat Case, Procedural Order No 3 dated January 27 2010 p.18-20

a caliber of privilege for the *Abaclat* proceedings, the Tribunal acted within the law in issuing an order to prescribe the bearing of confidentiality.

From a legal framework, there were clampdowns on particular expressions of discretion and privacy based on the ICSID Convention, the Administrative and Financial Regulations, and the ICSID Arbitration Rules, because these applied solely to the Tribunal and to ICSID. Article 48(5) of the ICSID Convention and Regulation 22(2) of the Administrative and Financial Regulations does not allow the Center or the ICSID Secretary General respectively to publish the award or reference proceedings without party consent. Further, Rules 6(2), 15, and 32(2) of the ICSID Arbitration Rules dictate that Arbitrators shall keep all proceedings confidential, shall hold excogitations of the Tribunal in camera, and provided both parties consent, may open the hearing to persons beyond the brawling parties, having made accommodation for the preservation of licensed or classified information.⁴⁶

The huge task for the *Abaclat* Tribunal therefore, was to uphold transparency considerations using technique that did not compromise the rectitude of the arbitration proceedings. Arguably however, under ICSID, very little restriction was at the time placed by the law on the disputing parties to limit them from any action amounting to disclosure of privileged arbitration proceedings. By law, much responsibility for maintaining transparency and confidentiality lay with the Arbitral institution and the Tribunal. It is for this reason that the *Abaclat* Tribunal found that ICSID Convention and Arbitration Rules were insufficient in addressing the motive of confidentiality and transparency.

The *Abaclat* Tribunal was obligated still to deduce whether the parties could discuss the case in public. Drawing from the *Biwater* Tribunal's decision on the same, the *Abaclat* Tribunal allowed parties to engage in discussions about the case, provided any such public discourse was inexorable and not antagonizing to either party.⁴⁷ As there was no general rule on confidentiality, the *Abaclat*

⁴⁶ *Abaclat* Case, Procedural Order No 3 dated January 27 2010 p. 25

⁴⁷ *Abaclat* Case, Procedural Order No 3 dated January 27 2010 p. 29

Tribunal, just as in the *Bewater Case*, pursued ancillary discretion and sustained that the matter would be decided on a separate or independent basis, making careful consideration to achieve robust solutions in accordance with the interests of both parties.⁴⁸

3.4 Confidentiality of Documents

Based on the aforementioned party positions, the *Abaclat* Tribunal determined that no privilege diminution was imposed on the publication of the Award and to orders or directions of the Tribunal. However, subject to parties agreeing otherwise, specific restrictions were imposed for the listing of documents which included minutes and records of hearings, pleadings, written memorials and other written submissions of the Parties, documents and exhibits submitted with pleadings.

Further, the *Abaclat* Tribunal ruled against the permissibility of the Respondent's "Supplemental Exhibits" as drawn from expert opinions published in other multiple arbitrations. These submissions were deemed as excessive and disproportional to the intended use. The Tribunal rationalized that, on account of the fact that these legal opinions were already in the public domain, along with the Respondent's wealth of experience in previous arbitrations where these expert opinions were involved, then the Respondent was already well placed to vindicate its truth without referring to documents attached to substitute arbitration proceedings.

In a nutshell, the *Abaclat* Case is critically pivotal in the ongoing discussion about transparency and confidentiality in treaty-based investor-state arbitrations, with the principles drawn from the Tribunal's Procedural Order no. 3 being applicable in theory, in practice, and in policy. The next section discusses these implications for policy with particular emphasis on the overriding shift towards implied transparency.

⁴⁸ *Abaclat* Case, Procedural Order No 3 dated January 27 2010 p. 27

4. Implications for Policy: Shifting Towards Implied Transparency

The debate on transparency reforms is continually evolving. Yet to effect the necessary changes that will ensure accountability and proper governance in treaty-based investor-state arbitrations, challenges to surmount do consistently recur. At contract drafting level, effecting change is hard owing to the certitude that it is plausibly costly and time-consuming to expect to cover all unforeseen eventualities that may occur between stakeholders in international investments.

At the height of negotiations between private investors of one state and another state, otherwise known as BITs, much discourse has surrounded the impreciseness of legislative texts on transparency and confidentiality in ensuing arbitration proceedings. Unfortunately, it is almost close to impossible to amend existing pacts as the undertaking is long-winded and hard to reverse. It may therefore stand that arbitral institutions hold the strongest hand in deducing the metamorphosis of the transparency movement, because Conventions and procedural Rules can infallibly be amended to guarantee that arbitration as a medium of alternative dispute resolution remains attractive for investors and state entities.

Effective April 1 2014, the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration were adopted to provide transparency and accessibility to the public of treaty-based investor-state arbitration. These transparency norms apply to pact-related disputes entered into prior to April 1 2014, if the parties so agree. The Transparency Rules also apply to dissension arising out of pacts finalized effective April 1, 2014 when investor-state arbitration is instigated under the UNCITRAL Arbitration Rules, under rules other than UNCITRAL, and in extemporaneous proceedings, unless parties agree otherwise.⁴⁹ In principle, under these Rules on Transparency, it is up to the disputing parties and interested third-parties to make the necessary

⁴⁹ United Nations Commission in International Trade Law. 2014. "UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration." *United Nations Commission in International Trade Law*. April 1. Accessed April 15, 2022.
<https://uncitral.un.org/en/texts/arbitration/contractualtexts/transparency>

applications to the arbitral tribunals expressly requesting for confidentiality. There are no general presumptions of confidentiality or transparency applicable to parties.

Similar to UNCITRAL, the privilege or transparency standard in an ICSID reference depends on the agreement of the contenders, the applicable pact and the arbitrament.⁵⁰ Even more recently as to transparency reforms, the ICSID Administrative Council, on March 21, 2022 approved the amended ICSID Rules which take effect on July 1, 2022. Under the amendments, there shall be an increase in the publication of awards, orders, and decisions. Whereas Article 48 of the ICSID Convention disallows promulgation of awards without express clearance by the contenders, Rule 63 of the ICSID amendment stipulates that consent to publish awards is 'deemed given unless a party objects in writing within sixty (60) days after the award is issued.⁵¹ In other words, whereas previously consent had to be expressly requested by the parties, the amended ICSID Rules suggest an implied transparency unless challenged in writing by either party; and even in case of an objection, ICSID Secretariat retains an overriding right to prepare legal excerpts of the Award.

From this discourse, three key takeaways from existing literature (section two) and the *Abaclat* Case (section three) are set forth. First, unless resolved, ambiguity and the gaps in existing Conventions and arbitration Rules are triggers for potential perpetual debate among disputing parties. Several authors

⁵⁰ ICSID. 2022. *Confidentiality and Transparency - ICSID Convention Arbitration*. Accessed April 15, 2022.

<https://icsid.worldbank.org/services/arbitration/convention/process/confidentiality-transparency#:~:text=The%20ICSID%20Convention%20and%20Arbitration%20Rules%20do%20not,and%20documents%20that%20they%20wish%20to%20keep%20confidential>

⁵¹ Colorado, Orlando Cabrera, and Ivan Bracho Gonzalez. 2022. "Amendments to ICSID Rules set to come into effect on July 1, 2022." *Engage: Legal Insight and Analysis*. April 6. Accessed April 15, 2022.

<https://www.engage.hoganlovells.com/knowledgeservices/news/amendments-to-icsid-rules-set-to-come-into-effect-on-july-1-2022-major-changes-to-improve-transparency-and-efficiency-of-proceedings>

have cited the ICSID Convention and ICSID arbitration Rules or the UNCITRAL Rules as being insufficient in prescribing the confidentiality protocol to be observed especially for parties. It is therefore recommended that arbitral institutions refine future legislative text to be more robust in its accommodation of different party needs for privacy, whilst still maintaining the duty to the public for transparency. The law should, for example, be more consistent and clearer about whether and to what extent parties can discuss their dispute in public, the indemnification of proprietary party information, and on shielding the arbitration outcome from being necessarily swayed due to public pressure.

Second, until such time as the law comprehensively develops in the area of transparency and confidentiality in treaty-based investor-state arbitration, the onus is on arbitral tribunals to exercise discretionary caution in determining on a case-by-case basis the standard for privacy and transparency. Whereas the principles of investor-state dispute settlement carry the same weight and relevance, each dispute is uniquely distinct and must therefore be presided over devoid of compromises in procedural integrity. For example, inasmuch as the *Biwater Case* and the *Abaclat Case* were similar in how the tribunals handled the confidentiality orders, the facts of each case still remain distinct as the former involved a water resource dispute, while the latter was a mass claim debt dispute.

Finally, the tidal currents in the transparency movement are shifting towards implied transparency. With huge emphasis being placed on integrity, proper governance, and accountability, it is expected that even more treaty-based investor-state arbitrations will proceed in the limelight for the betterment of the profession and the alternative dispute resolution industry collectively. Bound by amended Conventions and Rules, disputing parties will be expected to implicitly anticipate that whatever redress is sought through investment arbitration shall be predisposed to public involvement to a higher rung than has been in the past. This move towards implied transparency will also be useful not just for arbitral institutions and policy makers but also for academic scholars

who can leverage the wealth of information to conduct further exploration of the subject, which is still insufficient in many aspects.

5. Areas for Future Research

Most researchers leaned towards a consensus that, subject to consent by the parties, investment arbitration does not breach the conduct of confidentiality when made available to the public. There is however need to craft robust transparency reforms in the Rules which address the privacy paradox,⁵² provide for appeal processes, and allow submissions of *amicus curiae* briefs⁵³ especially where human rights and labor cases are concerned. Future research can detail empirical research in the area of privacy, confidentiality and transparency in arbitration practice,⁵⁴ particularly incorporating quantitative tests of existing arguments. With more arbitration proceedings, hearings, and awards being made public, it is anticipated that a body of case law will be developed in support of the transparency movement which can contribute significantly to widening this field of research. This rich repository can also be used to trace the evolution of transparency and confidentiality in investor-state arbitrations.

Additionally, an assessment of the African blueprint under the auspices of AUs external treaties would shed light on the management and coordination of partnerships referred to ISDS⁵⁵. In moving away from a donor-recipient relationship, the leaders of the AU member States have worked tirelessly towards developing mutually beneficial partnerships with different countries at the multilateral level. The AU has currently at least nine active external

⁵² Schmitz, Amy J. 2006. "Untangling the Privacy Paradox in Arbitration." *University of Kansas Law Review* 54, no. 5 1211-1254.

⁵³ Lazo, Rodrigo Polanco. 2010. "International Arbitration in Times of Change: Fairness and Transparency in Investor-State Disputes." *Proceedings of the Annual Meeting (American Society of International Law), Vol. 104*. Cambridge University Press. 591-595.

⁵⁴ Schmitz, Amy J. 2006. "Untangling the Privacy Paradox in Arbitration." *University of Kansas Law Review* 54, no. 5 1211-1254.

⁵⁵ ISDS – Investor State Dispute Settlement

partnerships with dynamic treaties focused on Africa's Agenda 2063.⁵⁶ As one of its main initiatives, the African Continental Free Trade Area (AfCFTA) is the largest Free Trade Area by constitution of member States. However, while the AfCFTA provides for a dispute settlement body for disputes arising from intra-African trade, there is still limited provision for settlement of disputes with intercontinental investors who are external to the African context.⁵⁷ It will be critical to determine how these disputes under these treaties and managed, especially because of the nature and scope of development projects involved.

⁵⁶ African Union. 2022. *External partnerships between the AU and organisations, regions or countries*. Accessed April 15, 2022. <https://au.int/en/partnerships>

⁵⁷ Muigua, Dr. Kariuki. 2021. "The Limitations of AfCFTA Dispute Settlement Mechanism (DSM) in Addressing Investment Disputes in Africa." *The Arbitrator Africa*. November 6. Accessed April 15, 2022. <https://the arbitrator.africa/2021/11/06/limitations-of-afcfta-dispute-mechanism/>

Ring-fencing Arbitration traits to enhance its growth and development

By: *Peter Mwangi Muriithi* & Lily Njeri Maina***

Abstract

Arbitration is one of the modes of dispute resolution mechanism that is part of the broad umbrella term “Alternative Dispute Resolution Mechanisms”. By definition, the term Alternative Dispute Resolution Mechanisms denotes all forms of dispute resolution other than litigation or adjudication through the courts.¹

The allure of arbitration as an alternative mode of dispute resolution singularly lies in its nature manifested through its traits and/or attributes. Arbitration traits, make arbitration stand out as an alternative mode of dispute resolution mechanism and highly preferred in the resolution of commercial and investment disputes.

It is premised on the foregoing, that this paper proceeds to advocate for deliberate efforts to ring-fence arbitration traits to prevent their erosion and infiltration. This will go a long way in promoting the growth and development of arbitration as a mode of dispute resolution alternative to litigation.

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¹Chief Bayo Ojo, Achieving Access to Justice Through Alternative Dispute Resolution, (Vol.1 Issue 1 2013, Chartered Institute of arbitrators in Kenya.)

In advancing the necessity of ring-fencing arbitration traits, this paper shall offer; an introduction, briefly critique arbitration traits, offer practical measures that can be undertaken to ring-fence arbitration traits to uphold the salient nature of arbitration and lastly the paper shall give a conclusion.

1.0 Introduction

Over time, arbitration as a mode of dispute resolution has grown in leaps and bounds. Arbitration is considered to be a private system of adjudication of disputes.² As such, parties who arbitrate are the ones who have made a deliberate choice to resolve their disputes outside of any judicial system.³ The allure of arbitration as an alternative mode of dispute resolution singularly lies in its nature, which can be traced from arbitration's inherent characteristics and/or traits that make it stand out as a mode of dispute resolution.⁴ It is then paramount that arbitration traits and characteristics be upheld in the arbitration process at all material times.

It is noteworthy that the very definition of the term arbitration as a mode of dispute resolution expresses the traits of arbitration. This is demonstrated by various definitions coined by different scholars on what constitutes arbitration as a mode of dispute resolution.

For instance, *Khan* defines arbitration as private consensual process in which disputing parties decide to present their grievances to a third party for

²Khan F, *Alternative Dispute Resolution*, a paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

³Margaret L. Moses, *The principles and practice of International Commercial Arbitration*, page 1(Cambridge University Press)

⁴Kariuki Muigua, *Promoting International Commercial Arbitration in Africa* page 2(Published in CI Arb Kenya, *Alternative Dispute Resolution Journal* Volume 5, Number 2 2017)

resolution.⁵ Closely, similar to this definition by *Khan* is the definition by *Gould*, who defines arbitration as a process in which formal disputes are determined by a private tribunal which has been selected by the parties to the dispute⁶. *Jacob K Gakeri*⁷ in his wisdom defines *arbitration* as an adjudicative process in which the parties present evidence and arguments to an impartial and independent third party who has the authority to hand down a binding decision based on objective standards.

The Black's Law Dictionary defines arbitration, as a method of dispute resolution involving one or more neutral third parties who are usually agreed to by the disputing parties and whose decision is binding.⁸

Lastly, in a more comprehensive manner, *Kariuki Muigua* widely defines arbitration as a mechanism for the settlement of disputes which usually takes place in private, pursuant to an agreement between two or more parties in which parties agree to be bound by the decision to be given by the arbitrator according to law, or if so agreed, other considerations after a full hearing, such decision being enforceable in law.⁹ The foregoing definitions of arbitration capture the following seminal traits of arbitration namely; confidentiality, party autonomy and the finality of arbitral awards.

⁵Khan F, Alternative Dispute Resolution, a paper presented to the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁶Gould N, Dispute resolution in the Construction Industry: An Evaluation of British Practice: A Department of the Environment, Transport and the Regions Partners in Technology Research Project (Thomas Telford, 1999) 84

⁷Jacob K Gakeri, Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR (*International Journal of Humanitarian and Social Sciences*, Vol. 1 No. 6; June 2011) page 221

⁸ Bryan A. Garner, Black's Law Dictionary 9th Edition page 119

⁹Kariuki Muigua, Settling Disputes Through Arbitration in Kenya (3rd Edition, 2017) Page 2

It is premised on the foregoing that this paper seeks to analyze the salient arbitration traits that need to be ring-fenced to enhance the growth and development of arbitration.

2.0 A Brief Overview of the Salient Arbitration Traits

One of the traits of arbitration is *confidentiality*. Confidentiality principally takes two forms. One is the privacy of arbitral proceedings. Proceedings in an arbitration process are private to the arbitrator, parties, party representatives and any other persons admitted therein with the parties' consent.¹⁰ Premised on the privacy of arbitral proceedings, third parties and strangers are excluded and have no access to the arbitration proceedings without the consent of parties.¹¹ Second, is the confidentiality of the documentation produced or relied upon in the proceedings (submissions or statements of case and counterclaim) transcripts, pleadings, rulings, directions, and awards published by the arbitrator.¹² In this regard, proceedings, materials disclosed or created during arbitral proceedings and the arbitral award cannot be disclosed by the arbitral tribunal, parties, their representatives, witnesses or any other individuals attending without the consent of the parties.¹³

¹⁰Wilfred A. Mutubwa, Commercial and Investment Arbitration an African perspective page 1

¹¹ Asian International Arbitration Centre (AIAC), Confidentiality in Arbitration: Fundamental virtue or mere illusion?

<[https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-](https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion?#:~:text=confidentially%20in%20arbitration%20refers%20to,the%20consent%20of%20the%20parties.)

[Merellusion?#:~:text=confidentially%20in%20arbitration%20refers%20to,the%20consent%20of%20the%20parties.](https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion?#:~:text=confidentially%20in%20arbitration%20refers%20to,the%20consent%20of%20the%20parties.)>lastly accessed on 20th September 2022

¹²Wilfred A. Mutubwa, Commercial and Investment Arbitration an African perspective page 1

¹³Asian International Arbitration Centre (AIAC), Confidentiality in Arbitration: Fundamental virtue or mere illusion?

<[https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-](https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion?#:~:text=confidentially%20in%20arbitration%20refers%20to,the%20consent%20of%20the%20parties.)

[Illusion?#:~:text=confidentially%20in%20arbitration%20refers%20to,the%20consent%20of%20the%20parties.](https://www.aiac.world/news/189/CONFIDENTIALITY-IN-ARBITRATION:-Fundamental-Virtue-or-Mere-Illusion?#:~:text=confidentially%20in%20arbitration%20refers%20to,the%20consent%20of%20the%20parties.)> lastly accessed on 20th September 2022

It has been advanced that confidentiality of arbitration proceedings and award is perhaps one of its most hallowed attractions as a dispute resolution mechanism.¹⁴ It is premised on this reasoning, that some scholars aver that confidentiality as a trait of arbitration, comes ahead of flexibility as an attribute of arbitration over traditional court litigation.¹⁵

The confidential nature of arbitration was captured by the English Court of Appeal in:

Dolling-Baker v Merrett, which stated that:

“...as between parties to an arbitration, although the proceedings are consensual, may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or closed or produced in the course of the arbitration, or transcripts or notes of evidence in the arbitration or the award, and indeed not to disclose what evidence had been given by any witness in the arbitration, save with consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary, just as in the case of the implied obligation of secrecy between banker and customer...”¹⁶

Another trait associated with arbitration is *party autonomy*. Party autonomy is the freedom of the parties to construct their contractual relationship in the way

¹⁴Wilfred A. Mutubwa, Commercial and Investment Arbitration an African perspective page 1

¹⁵See; Laura Kester, Confidentiality in US Arbitration, (spring 2012) NYSBA, Newyork Dispute Resolution Lawyer Vol. 5 No.1 at 23, Kariuki Muigua, Settling Disputes Through Arbitration in Kenya, March, 2022, (4th Edition, 2022) page 3, Marlon Meza-Salas, Confidentiality in International Commercial Arbitration: Truth or Fiction? September 23, 2018 and Bernardo M. Cremades & Rodrigo Cortés, The Principle of Confidentiality in Arbitration: A Necessary Crisis page 29 (Journal of Arbitration Studies, Vol. 23 No. 3

¹⁶*Dolling-Baker v Merrett*, [1990] 1 W.L.R. 1205 A.C. at 1213 [Eng.]

they see fit.¹⁷ In other words, *party autonomy* in arbitration is the freedom of the parties to an arbitration agreement to choose: their preferred seat of arbitration, the panel of arbitrators, the issues to be arbitrated on, the law applicable in determining those issues, the language to be used during the proceedings and the procedure to be followed during the arbitral process.¹⁸ In other words, it all depends upon the parties themselves to arrange their arbitration agreement freely without any control.¹⁹

Party autonomy as an attribute in arbitration gives parties control over the dispute resolution process by allowing them to determine by agreement, the arbitrator to arbitrate their dispute, the forum, the applicable law, language of the proceedings and the procedures to be adopted in arbitrating their dispute.²⁰ According to *Ansari*, the *principle of party autonomy* is the backbone or a cornerstone of the arbitration proceedings.²¹

It has been advanced that one of the advantages associated with party autonomy as an attribute of arbitration, is that parties to a dispute have the autonomy to choose the panel of arbitrators to hear and determine their dispute. This gives the parties an opportunity to choose arbitrators that are quick to grasp the complex issues at hand. In return, the arbitrator chosen by the parties

¹⁷Abdulhay, S., *Corruption in International Trade and Commercial Arbitration*, (London: United Kingdom: Kluwer Law International, 2004) page 159.

¹⁸Faisal M. Al-Fadhel, "Respect for Party Autonomy under Current Saudi Arbitration Law" (*Arab Law Quarterly*, Vol. 23 No. 1 (2009)) pp 31-57 (<https://www.jstor.org/stable/27650640>) lastly accessed on 21st September 2022

¹⁹Sunday A. Fagbemi, *The doctrine of Party Autonomy in International Commercial Arbitration: Myth or Reality?* Page 224

²⁰U.N. Conference on Trade and Development, New York and Geneva, 2005, *Dispute Settlement: International Commercial Arbitration*, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/ Add.38, <http://unctad.org/en/Docs/edmmisc232add38_en.pdf> lastly accessed on 20th September 2022 [Hereinafter U.N. Conference on Trade and Dev. 5.1]

²¹Jamshed Ansari, "Party Autonomy in Arbitration: "A Critical Analysis" (2014) 6(6) *Researcher* 47, 53 (ISSN: 1553-9865) lastly accessed on 20th September 2022

is also quick to dispense with the dispute, thus saving the parties time and, more importantly, money.²²

Unlike litigation, where the judges are arbitrarily designated, in arbitration, through party autonomy, parties select their arbitrators, which means that they can choose individuals with particular expertise who are able to quickly comprehend complex technical issues.²³ This attribute, amongst others, makes arbitration the preferred mechanism to resolve disputes especially commercial disputes where technical and complex matters may be the subject matter of the dispute.²⁴

Buttressing the foregoing Collier and Lowe correctly averred;

*"...where the courts might appear remote, rigid, and slow and expensive in their procedures and the judges might seem unversed in the ways of commerce and the law, insensitive and ill adapted to the exigencies of commercial life, arbitrators offered an attractive alternative. Arbitrators were originally drawn from the same commercial community as the traders, often experienced in the trade, capable of offering practical suggestions for the settlement of the dispute and of doing so informally, quickly and cheaply."*²⁵

Further, arbitration is considered to be a *flexible* means of settling disputes. Flexibility as an attribute of arbitration lies in the fact that the parties can bypass certain procedural requirements associated with litigation that could potentially

²²Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 250 to 251

²³Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 250 to 251

²⁴Ibid No. 22

²⁵John G. Collier & Vaughn Lowe, The Settlement of Disputes in International Law: Institutions and Procedures 45-46 (1999).

lengthen the dispute settlement. This flexibility also contributes to the faster and cheaper resolution of disputes.²⁶

The allure of arbitration also lies in the fact that it operates in exclusion of courts and its transnational applicability in international disputes with minimal or no interference by the national courts, thus boosting the parties' confidence in realizing justice in the best way achievable.²⁷ Premised on the attribute of transnational applicability, international arbitration awards issued by international arbitral tribunals are easier to enforce in foreign states than domestic judicial judgments.²⁸

Over time, arbitration has been lauded over litigation as a faster and easier method of settling legal disputes.²⁹ Further, the *finality and binding nature* of arbitral awards which are not subject to any appeal mechanism, is also commended for being one of the leading attributes of arbitration in dispute determination. The fact that an award is not subject to appeal on the merits gives the parties added security about the finality of the dispute resolution process.³⁰ These attributes as analyzed above make arbitration an attractive means of solving disputes especially commercial disputes.

²⁶Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes (Source: The International Lawyer, Vol. 47, No. 2 (FALL 2013), page 251

²⁷Kariuki Muigua, Promoting International Commercial Arbitration in Africa page 2(Published in CI Arb Kenya, Alternative Dispute Resolution Journal Volume 5, Number 2 2017)

²⁸Tsotang Tsietsi, International Commercial Arbitration: Case Study of the Experiences of African States in the International Centre for Settlement of Investment Disputes page 253

²⁹U.N. Conference on Trade and Development, New York and Geneva, 2005, Dispute Settlement: International Commercial Arbitration, 5.1 International Commercial Arbitration, 5, U.N. Doc. UNCTAD/EDM/Misc.232/ Add.38, <http://unctad.org/en/Docs/edmmisc232add38_en.pdf>lastly accessed on 17th September 2022

[Hereinafter U.N. Conference on Trade and Dev. 5.1]

³⁰Ibid No. 29 page 8

3.0 Ring-fencing Arbitration Traits to enhance its growth and development.

Arbitration has continued to grow in leaps and bounds becoming the most preferred dispute resolution mechanism for many investors and entrepreneurs.³¹ To maintain the trajectory of the growth and development of arbitration, there is the need to promote practical measures that will ensure arbitration traits are upheld at all material times. These include;

a) Arbitrators in the exercise of their jurisdiction and powers in an arbitration process should uphold arbitration traits at all material times;

In an arbitration process, the arbitrator and/or arbitral tribunal is clothed with certain jurisdiction and powers. There is a very close relationship between jurisdiction and power, relative to a dispute resolution tribunal.³² Indeed, it is difficult to differentiate between these two words given that in most cases the words are used interchangeably. Jurisdiction refers to the subject matter a tribunal/court/authority is allowed by law to address.³³ Thus, no action can be taken if the arbitral tribunal does not have jurisdiction. On the other hand, power is the capacity, ability, control, influence or devises vested in or exercisable by someone e.g. an arbitrator to carry out a task.³⁴

The arbitrator's jurisdiction and powers are usually derived from; the arbitration agreement between parties, the statutes, common law, and customs of trade.³⁵ Another source of an arbitrator's jurisdiction and powers is

³¹McLaughlin, Joseph T. "Arbitration and Developing Countries." *The International Lawyer*, vol. 13, no. 2, 1979, Page 211 <JSTOR, www.jstor.org/stable/40705956> lastly accessed on 17th September 2022

³² Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (4th Edition, 2022) Page 108

³³Ibid No. 32 Page 109

³⁴Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (4th Edition, 2022) Page 109

³⁵Ibid No. 32 Page 116 to 117

arbitration rules adopted by parties in their arbitration agreement or adopted by consent in *ad hoc arbitration*³⁶ by parties.

In the exercise of their jurisdiction and powers, arbitrators are principally the masters of procedure in an arbitration process.³⁷ This by implication means that arbitrators have an important role to play in ring-fencing arbitration traits and preventing their erosion. This is usually through various orders for directions and rulings made by arbitrators in an arbitration process in the exercise of their jurisdiction and powers.

Orders for directions and rulings made by arbitrators should prevent infiltration of *procedural rigidity, publicity and combativeness*, traits that are usually associated with litigation. Also, in rendering interim and final awards, arbitrators should at all material times uphold arbitration traits such as the finality of arbitral awards and confidentiality. Upholding arbitration traits by arbitrators in an arbitration process will to a great extent promote the growth and development of arbitration.

b) Enactment of Arbitration Rules that uphold Arbitration Traits

At the heart of an arbitration process are arbitration rules. Arbitration rules are intended to be incorporated into the parties' contract, whereby they become a

³⁶See; Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (4th Edition 2022) Page 11 (**Ad hoc Arbitration** is one that is not administered by an institution as the arbitration agreement does not specify an institutional arbitration, and may encompass domestic or international commercial arbitration. The parties then have to determine all aspects of the arbitration like the selection and manner of appointment of the arbitral tribunal, applicable law, procedure for conducting the arbitration and administrative support without assistance from or recourse to an arbitral institution. Ad hoc Arbitration does not necessarily require the parties to start from scratch and draft their own rules. They can use the rules of an arbitration institution without submitting the dispute to that institution.)

³⁷See; Section 20(2) of the Arbitration Act No. 4 of 1995 and Njeri Kariuki, *Arbitral proceedings in Kenya* <<https://www.lexology.com/library/detail.aspx?g=720f8f3d-e63d-4230-b391-995f59ce346c>> lastly accessed on 18th September 2022

source of substantive contractual rights and obligations and set out the agreed procedure to be followed in the arbitration of the dispute between the parties.³⁸ Premised on the foregoing, it is clear that arbitration rules play a critical role in regulating the manner in which a particular arbitration process will be undertaken. As such, well-coined and drafted arbitration rules can play an enormous role in upholding arbitration traits.

Arbitration rules are enacted by various institutions offering arbitration services. A glance at some of the arbitration rules demonstrates the co-relation between arbitration rules and upholding of arbitration traits.

The Chartered Institute of Arbitrators (Kenya Branch) Arbitration rules, 2020 for example rules 88 to 92 set out the jurisdiction and powers of the tribunal. Such wide jurisdiction and powers granted to the arbitral tribunal can allow arbitrators to make orders for directions and decisions that uphold seminal arbitration traits.

Rule 112 of the Chartered Institute of Arbitrators (Kenya Branch) Arbitration rules, recognizes and promotes the finality of an arbitral award by providing that the arbitral award shall be final and binding on all parties.³⁹

Article 30 of the London Court of International Arbitration (LCIA) Rules 2020⁴⁰ seeks to promote and uphold *confidentiality* as a trait in arbitration by providing verbatim that;

³⁸Chartered Institute of Arbitrators, Domestic Arbitration Workbook (Module 1-Law, Practice & Procedure) page 64

³⁹Chartered Institute of Arbitrators (Kenya branch) Arbitration Rules, 2020 <<https://ciarbkenya.org/wp-content/uploads/2021/03/chartered-institute-of-arbitrators-kenya-branch-arbitration-rules-2020.pdf>> lastly accessed on 18th September 2022

⁴⁰ LCIA Arbitration Rules 2020 <https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> lastly accessed on 18th September 2022

*“...The parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials in the arbitration created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain, save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right, or to enforce or challenge an award in legal proceedings before a state court or other legal authority. The parties shall seek the same undertaking of **confidentiality** from all those that it involves in the arbitration, including but not limited to any authorized representative, witness of fact, expert or service provider*

Further, Article 26.8 of LCIA Arbitration Rules 2020,⁴¹ seeks to uphold the finality of an arbitral award as a trait of arbitration by providing verbatim that; *Every award (including reasons for such award) shall be final and binding on the parties.*

Additionally, Article 26.8 of LCIA Arbitration Rules 2020 imposes an obligation on parties who adopt the said rules to undertake to implement the award by the arbitral tribunal.

In this regard Article 26.8 of LCIA Arbitration Rules 2020 provides that;

“...The parties undertake to carry out any award immediately and without any delay (subject only to Article 27)”⁴²

Further, in a bid to promote limited court interference as a trait in arbitration, Article 26.8 of LCIA Arbitration Rules 2020, requires parties to waive their right of any form of appeal, review or recourse to any state court or other legal authority on arbitral awards rendered under the *aegis* of the said rules. It is on

⁴¹ Ibid No, 38

⁴²Article 26.8 of LCIA Arbitration Rules 2020

<https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> lastly accessed on 18th September 2022

this basis that Article 26.8 of LCIA Arbitration Rules 2020 provides verbatim that;

“...the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law.”⁴³

Lastly, in a bid to promote flexibility as a trait in arbitration, Article 14 of LCIA Arbitration Rules 2020, which outlines the conduct of arbitration proceedings, grants the arbitrator wide discretion in the discharge of his duty. In this regard Article 14.2 of LCIA Arbitration Rules 2020 provides that⁴⁴;

“...The Arbitral Tribunal shall have the widest discretion to discharge these general duties, subject to the mandatory provisions of any applicable law or any rules of law the Arbitral Tribunal may decide to be applicable; and at all times the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal’s discharge of its general duties.”

Similarly, the International Chamber of Commerce (ICC) Arbitration Rules 2021 seeks to enforce various characteristics of arbitration.

For instance, Articles 20 and 21 require that parties be accorded the first priority to choose the language of the proceedings and the applicable rules of law respectively, failure to which, the arbitral tribunal shall determine the same.⁴⁵

⁴³Article 26.8 of LCIA Arbitration Rules 2020

<https://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2020.aspx> lastly accessed on 18th September 2022

⁴⁴Article 14 of LCIA Arbitration Rules 2020

⁴⁵Article 20 and Article 21 of the International Chamber of Commerce Arbitration Rules, 2021<<https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration/#top>> lastly accessed on 21st September 2022

However, it is noteworthy that some of the provisions of the ICC Arbitration Rules 2021 appear to limit party autonomy in exceptional circumstances. Particularly, Article 12(9) grants the Court (in this case, the International Chamber of Commerce) discretion to overturn parties' unconscionable agreements in relation to the constitution of an arbitral tribunal. Article 12(9) provides as follows;

*"Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances, the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award."*⁴⁶

It is apparent from the foregoing that arbitration rules play a seminal role in upholding arbitration traits. As such, arbitration institutions should purpose to enact arbitration rules that prioritize, promote and uphold arbitration traits. This would significantly ring-fence arbitration traits and contribute to the growth and development of arbitration.

Indeed, the amendments done to institutions' arbitration rules should at all material times seek to uphold traits synonymous with arbitration. Such a deliberate endeavor would significantly contribute to the growth and development of arbitration.

c) Drafting of Arbitration Agreements that uphold Arbitration Traits.

At the centre of any arbitration process is an arbitration agreement, especially considering that it is the basis of any arbitration. As such, arbitration agreements play a critical role in ring-fencing arbitration traits. Basically, an arbitration agreement is an agreement where the parties undertake that specified matters arising between them shall be resolved by a third party acting as an arbitrator and that they will honour the decision (award) made by that person.⁴⁷

⁴⁶Ibid No. 42, Article 12(9)

⁴⁷W. Turner, "Arbitration Agreements", 66(3) *Arbitration* 230 (2000)

Succinctly, an arbitration agreement is defined as an agreement between two or more parties in which they agree to refer disputes to arbitration for determination.⁴⁸

Section 3 of the Arbitration Act,⁴⁹ defines “arbitration agreement” as an agreement by the parties to submit to arbitration, all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Further, an arbitration agreement has been defined as a separate contract, procedural in nature⁵⁰ and ancillary to the main contract which does not create substantive rights between the parties, but provides how disputes which may arise should be resolved.⁵¹

Rather uniquely, arbitration agreement, has also been described as an agreement which creates collateral rights to the main contract. To demonstrate the form in which an arbitration agreement may manifest itself, an arbitration agreement is also considered to be an agreement to submit present or future disputes to arbitration.⁵²

Essentially, an arbitration agreement is a written contract in which two or more parties agree to use arbitration, rather than courts, to decide all or certain

⁴⁸Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* page 97

⁴⁹ Arbitration Act No. 4 of 1995, Laws of Kenya.

⁵⁰The Tobler case (1933) 59

⁵¹Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes* page 97

⁵² Paul Wilson & Co. vs Partenreederei [1983] AC 854, 917 Per Lord Diplock referring to Heyman v Darwins [1942] AC 356

disputes arising between them.⁵³ It is notable that an arbitration agreement may permit either one or both parties to refer a dispute to arbitration.⁵⁴

An agreement to arbitrate can be made before or after the dispute has arisen (*ad hoc* or relates to a future dispute).⁵⁵ Typically, parties agree to arbitrate by executing an agreement or contract which has an arbitration clause or a stand-alone arbitration agreement.⁵⁶

Generally, there are two types of arbitration agreements⁵⁷:

- a. *Where there exists an arbitration clause in a contract*-The parties in a contract undertake to submit to arbitration the disputes that may arise in relation to that contract. It is a clause that addresses how disputes that arise ought to be resolved if they do arise. It is anticipatory in nature. This is because during the execution of the contract the disputes never existed.
- b. *Mutual agreement by the parties to submit a dispute that has arisen to Arbitration*. It is also referred to as a submission agreement. This occurs where parties enter into an 'ad hoc' agreement to resolve a dispute that arises, via arbitration.

It is notable that in some cases the law may require execution of a submission agreement even where there is already an arbitration clause in existence. This is

⁵³Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rd Edition, 2017) Page 36

⁵⁴Susan Blake, Julie Browne, and Professor Stuart Sime, *A practical approach to Alternative Dispute Resolution*, 2nd edition page 399.

⁵⁵*Ibid* No. 54

⁵⁶Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rd Edition, 2017) Page 35

⁵⁷*Ibid* No. 56 Page 36

to complement the generic reference to disputes by a detailed description of the issues to be resolved.⁵⁸

The arbitration agreement whether in form of an arbitration clause or submission agreement ought to provide specifics regarding the Arbitration process e.g. procedure of selecting arbitrators, rules of procedure applicable etc.⁵⁹ It is in providing these specifics that form part of an arbitration process, that an arbitration agreement upholds and promotes various traits of arbitration such as party autonomy, privacy and confidentiality. It is on this basis that this paper avers that, a well-drafted arbitration agreement upholds various traits of arbitration considering that such arbitration traits form part of the ingredients of the agreement.

Indeed, an arbitration agreement in its very essence is a product of party autonomy, one of the traits of arbitration. Further, it has been accepted that a well-drafted arbitration agreement should incorporate the following traits of arbitration; finality of award, party autonomy, confidentiality, and flexibility.⁶⁰ It is then at the initiation of an arbitration process through an arbitration agreement, that parties should seek to incorporate various arbitration traits which consequently contribute to the growth and development of arbitration.

⁵⁸Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rd Edition, 2017) Page 36

⁵⁹Kariuki Muigua, *Settling Disputes Through Arbitration in Kenya* (3rd Edition, 2017) Page 37

⁶⁰Julian D. M. Lew, Loukas Mistelis, & Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) page 168

https://books.google.co.ke/books?hl=en&lr=&id=b1OgnDQ2UnwC&oi=fnd&pg=PR1&dq=drafting+arbitration+agreements&ots=l7VkGE8qPR&sig=pUburnBQ5bmpWoI0CZcVm7RqABA&redir_esc=y#v=onepage&q=drafting%20arbitration%20agreements&f=false accessed on 19th September 2022

d) Enactment and enforcement of clear and unambiguous national laws that promote arbitration traits

As highlighted in the foregoing, one of the characteristics of arbitration is the finality and binding nature of arbitral awards, which has over time been lauded for saving parties' time and resources in dispute resolution.

In Kenya, Section 32A of the Arbitration Act⁶¹ provides as follows: -

“Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act”

Notably, Section 10 of the Arbitration Act No. 4 of 1995 expressly provides for the extent of court intervention and states that *“Except as provided in this Act, no court shall intervene in matters governed by this Act.”*

Sections 35 and 36 of the Arbitration Act No. 4 of 1995 further outline instances when the High Court can interfere with an arbitral award, which are on matters regarding applications to set aside an award and recognition and enforcement of arbitral awards.⁶² A reading of these two sections implies that the decision of the High Court shall be final and thus unappealable.

However, the Kenyan Supreme Court in the case of; *Synergy Industrial Credit Ltd v Cape Holdings Ltd*⁶³, observed that different courts have held divergent views on whether the Act allows for further appeals from the High Court to the Court of Appeal. For instance, in *Anne Mumbi Hinga v Victoria Njoki Gathara*⁶⁴ the Court held as follows:

⁶¹The Arbitration Act, No. 4 of 1995

⁶²Arbitration Act, No. 4 of 1995

⁶³[2019] eKLR

⁶⁴ Civil Appeal No. 8 of 2009; [2009] eKLR

“...The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved

Similarly, the Court of Appeal, in the case of *Micro-House Technologies Limited v Co-operative College of Kenya*⁶⁵ held that it lacked jurisdiction since the appellant had no right to appeal a decision of the High Court to set aside an award under Section 39(3)(b) of the Arbitration Act, having not obtained leave. This position was upheld by the same court in *Synergy Industrial Credit Ltd v Cape Holdings Ltd*⁶⁶ where, the appeal was dismissed on grounds that other than under Section 39, no right of appeal lies to the Court of Appeal under Section 35 of the Arbitration Act.

Contrastingly, the Court of Appeal in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited*⁶⁷ held a divergent view from *Synergy Industrial* (*supra*) and held as follows:

“In our view, the fact that Section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution.”

In a bid to put an end to the seemingly never-ending back and forth, the Supreme Court of Kenya, in *Synergy Industrial Credit Ltd v Cape Holdings Ltd*⁶⁸ while acknowledging that Section 35 does not expressly oust appeals from the High Court to the Court of Appeal held that since the Arbitration Act is based in the UNICITRAL Model Law, which does bar further appeals, Section 35

⁶⁵Civil Appeal No. 228 of 2014; [2017] eKLR

⁶⁶Civil Appeal (Application)no. 81 of 2016

⁶⁷Civil Application No. Nai. 302 of 2015; [2017] eKLR

⁶⁸[2019] eKLR

should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system.

The Supreme Court further clarified its position in the celebrated case of; *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*⁶⁹ where it held that the only instance when an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in Section 35 (2) (a) and (b) and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either parties and that the Court of Appeal's narrow jurisdiction on arbitration matters should be so sparingly exercised, such that only in the clearest of cases, should the Court of Appeal assume jurisdiction.

Recently, in the case of; *Instalaciones Inabesa S.A v Kenya Electricity Transmission Company Limited (KETRACO) (unreported)*, the Court allowed a Preliminary Objection that sought to challenge an application for stay of execution of order allowing recognition and enforcement of the arbitral award in issue. One of the grounds for raising the objection was that, since the applicant had lodged an appeal at the Court of Appeal to challenge the High Court's decision granting recognition and enforcement orders, the Court lacked jurisdiction to grant a stay of execution, due to the applicant's failure to obtain the court's leave to appeal against the said Ruling.

The Court acknowledged the findings of the Supreme Court in the *Nyutu Case* that the Court of Appeal ought to have residual jurisdiction to counter unfairness but cautioned that such jurisdiction ought to be exercised carefully to avoid opening a floodgate of appeals that would undermine the very essence of arbitration.

⁶⁹[2019] eKLR

From the foregoing, it is evident that there is a great need for legislative intervention in the drafting of unambiguous legal provisions that seek to preserve the sanctity of the arbitration process.⁷⁰

Deliberate efforts to incorporate succinct provisions that protect and promote traits such as the finality and binding nature of arbitral awards will help curb the increased number of appeals lodged in relation to arbitral awards, boost confidence in the arbitration process and thereby enhance the growth and development of arbitration.

4.0 Conclusion

It is without a doubt that arbitration as an alternative dispute resolution mechanism, is identified and preferred by parties to resolve disputes due to its traits. Arbitration traits stand out, especially where arbitration as a mode of dispute resolution is compared with other dispute resolution mechanisms like litigation. It is premised on this understanding that this paper avers that there should be deliberate concerted efforts to uphold arbitration traits to prevent their erosion and/or abrogation. This will significantly contribute to the growth and development of arbitration.

⁷⁰Peter M. Muriithi, “Ramifications of the Decision of the Supreme Court in the case of Nyutu Agroviet Limited (Petition No. 12 of 2016)” *Alternative Dispute Resolution Journal*, Volume. 8, No. 1, 2020, Chartered Institute of Arbitrators-Kenya Branch (CIArb-K) (Available at SSRN:< <https://ssrn.com/abstract=3828803>>) lastly accessed on 21st September 2022

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Are Emergency Arbitrations Contemplated Under the Indian Arbitration Act? Some Reflections from Indian Courts

By: *Wilfred Mutubwa* *

APPELLANTS	RESPONDENT
1. FUTURE COUPONS PVT. LTD. 2. FUTURE RETAIL LIMITED (FRL)	AMAZON.COM NV INVESTMENT HOLDINGS

FACTS IN ISSUE

Amazon entered into Shareholder and Share Subscription Agreements with Future Coupon Private Limited (FCPL) by which Amazon intended to acquire 49% stake in FCPL. The aforesaid agreements contained an arbitration agreement, where the parties resolved to settle their disputes in accordance with the Arbitration Rules of the Singapore International Arbitration Center (SIAC) and chose New Delhi as the seat for the arbitration.

FCPL and its promoters entered into a Shareholder Agreement with Future Retail Limited (FRL). Through this Agreement, FCPL was granted certain protective rights. One of which being that the Retail Assets shall not be transferred, encumbered divested, or disposed of in favour of a restricted person.

However, due to a business down turn during the Covid 19 pandemic Future Retail Ltd went ahead to approve the transfer of its tangible assets to Reliance

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Group (a restricted person) in direct violation of its contractual responsibilities with Amazon. Aggrieved by the aforesaid transaction, Amazon initiated emergency arbitration proceedings before the SIAC. Amazon filed an application for emergency relief to prevent FRL and FCPL from taking further steps in the aforesaid transaction with the Reliance Group. The Emergency Arbitrator passed an Interim Award in favor of Amazon. FRL and FCPL appealed.

ISSUES

- Whether an Emergency Arbitrator's Award can be said to be within the contemplation of the Arbitration Act?
- What is the legal status of an Emergency Arbitrator?
- Whether a remedy or order can be obtained from the emergency arbitrator under Arbitration and Conciliation Act?

FINDINGS AND ANALYSIS OF THE COURT

The Court held that the concept of an emergency arbitrator is based on the autonomy of parties in an Arbitration as the law gives complete freedom to the parties to choose an arbitrator of their choice.

It also held that an emergency arbitrator is an arbitrator for all purposes. The court lauded the practice stating that a party can get quick reprieve under such a system, but if the Emergency Arbitrator's order is not followed, the entire procedure will be rendered useless. The court insisted that The current legal framework can optimally recognize the Emergency Arbitration, and no changes were necessary to enable enforcement.

The court confirmed that an order of the emergency arbitrator is binding upon the parties but not binding on any subsequently constituted arbitral tribunal. Subsequent tribunals have the power to reconsider, modify, terminate or annul the order/award of the emergency arbitrator as they hear the matter

The court also held that the order passed by the emergency arbitrator is a valid order under Section 17(1) and thus enforceable as would be an order of the Court under Section 17(2) of the Act.

Is Kenya Prepared to Be a Safe Seat for International Arbitration?

By: **Victor Kihika** *

Abstract

The struggle, as it were, for Kenya to position itself as a dispute resolution hub for business parties and investors is not only gaining traction but quickly intensifying. It is led by major players in dispute resolution, particularly the service providers in the arena of international arbitration. As such, it should concern consumers of justice from this mechanism as much as it does the providers of the service, what contribution they can and should make expressly or tacitly in facilitating the success of this venture.

This paper seeks to explore the attractiveness of Kenya to transnational commercial parties as a place for resolving their disputes in the sense of a seat or a venue. It builds on the existing literature pertaining to making Kenya a preferred seat and compares what the popular seats do to gain the attractiveness they have, and the chances that Kenya has. The paper also considers whether the term seat encapsulates, or is different from, venue. Additionally, it assesses the degree of Kenya's satisfaction of the safe seat principles.

1.0. Introduction

It is almost universally accepted that a commercial contract is arbitrable.¹ To submit to arbitration, parties can conclude an arbitration agreement either at the time of conclusion of the contract² or thereafter and it may be a clause within the contract, standard terms and conditions or in a separate document

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¹ Concept of arbitrability- Capability of resolution by arbitration (See Muigua K., *Settling Disputes Through Arbitration in Kenya* (3rd Ed, Greenwood Publishers Limited, 2019)).

² For requirement to conclude an arbitration agreement see Arbitration Act No 4 of 1995, s4.

altogether, which must be incorporated by reference.³ The importance of an arbitration agreement is underscored by the fact that it will survive the invalidity of the main contract.⁴

It is crucial that an arbitration agreement clearly designates a seat.⁵ It shall be remarked here that this choice is a huge contributor to the success of the arbitral process. Stateless arbitrations (arbitration without a seat) may be possible where none of the parties might need judicial intervention in the arbitral process.⁶ All factors held constant, this is virtually impossible.⁷

Multiple factors influence the selection of a seat, but parties rarely consider them at length. It shall be apparent that a great many times, parties hardly seriously negotiate the agreement to arbitrate for reasons elaborated elsewhere, let alone the specifics such as a seat.⁸ Often, it is the speed with which drafting takes place or already existing standard forms, but it has been observed that even when they have ample opportunity, they rarely give the issue due weight.⁹

In spite of this, the parties will have to contend with legal and practical implications which fundamentally affect the ability of the parties to benefit from an ideal arbitral process, should a dispute arise. This paper explores the meaning and implications of choice of seat from a Kenyan perspective. It then elucidates two categories of factors influencing choice. First, the ideal factors that should be taken into consideration when choosing a seat and second, the factors that parties, in reality, look at. Based on these, it compares the

³ Doctrine of incorporation by reference (See- BORN GARY, *International Commercial Arbitration* (3rd Ed, Kluwer Law International, 2021).

⁴ Doctrine of separability (See- Muigua (n 2)).

⁵ Hesse D, *The Seat of Arbitration is Important. It's That Simple*, 2018, Wolters Kluwer Arbitration Blog

⁶ Blake et.al, *A Practical Approach to Alternative Dispute Resolution*, 2018 Oxford University Press 5th Edition.

⁷ *Ibid*, Blake et.al.

⁸ Scherer M. & Jensen J., *Towards a Harmonized Theory of the Law Governing the Arbitration Agreement*, *Indian Journal of Arbitration Law*.

⁹ *Ibid*, Scherer (n9).

attractiveness of Kenya as a seat for international arbitration to that of established seats.

It also poses and attempts to respond to the question: What strategy is best for arbi-tourism? It suggests that the focus should not only be on marketing the already existing factors making Kenya a suitable destination, but also creating an environment that is attractive by itself. Hence, it remarks that arbi-tourism efforts ought to be accompanied with considerable and concerted effort from the players to improve Kenya's attractiveness.

It is intended that then, parties choosing Kenya as a seat of arbitration can assess the situation and compare it with the well-established seats based on objective factors and empirical data. In a similar vein, service providers can advise their clients accordingly. The paper will limit illustration in the realm of commercial contracts. It is hoped that it will retain utility for other kinds of arbitrable disputes such as construction or insurance disputes.

2.0. The TwoFold Meaning of "Seat": Problematic?

2.1. The meaning and different constructions

A seat is a location selected by the parties as the legal place of arbitration, which consequently determines the procedural framework of the arbitration.¹⁰

The term "seat" connotes both the legal home¹¹ and a geographical location.¹² The latter has not been given much weight, and authors have gone ahead to use the words "seat and venue" for emphasis and to avoid confusion.¹³ In fact, some draw a distinction between seat and venue.¹⁴ They opine that a seat is a purely legal notion with its own set of consequences whereas the venue is where the

¹⁰ Savic M., *Seat of Arbitration*, Jus Mundi, 8 Feb 2022.

¹¹ *C v D* (2007), EWHC 15; *Jambo Biscuits(K) Limited & 3 others v Jambo East Africa Limited & 3 others* [2021] eKLR para 55.

¹² *Ibid*, Born (n4).

¹³ Muigua K., *Looking into the Future: Making Kenya a Preferred Seat for International Arbitration*, 2021 (9) 1 ADR.

¹⁴ Raji D, *Seat v Venue of Arbitration: Settling the Conflict*, 2020, *AfricLaw Blog*

hearings are and all other activities are held, sometimes without ever setting foot in the seat.¹⁵ Be that as it may, it is arguable that this bifurcation effectively causes the term “seat” to bear one meaning and not the other, while it should encompass both.

This has in turn resulted in confusion. Had we to adopt this approach, are we suggesting that parties need to designate both a seat and a venue? This is especially so in the context of online arbitrations necessitated by the global pandemic (COVID-19) in jurisdictions that had neither embraced the idea nor had sufficient capacity hitherto and later exploited by parties which have led to arguments that parties have an enforceable right to a physical hearing.¹⁶ In how many cases do parties choose a different seat and venue?

The point here is that it is crucial to note that the place of the geographical element of the term has been relegated in favor of the legal element. Precisely, it has been repeatedly remarked, unnecessarily often, that the hearings need not necessarily be conducted at the seat.¹⁷ It has also been said that the seat is a legal construct with limited geographical relevance.¹⁸ As such, less attention than is due has been given to the geographical aspect of a seat.

On the contrary, statistics indicate that geographical implications are, and properly so, the major influencer in choice of a seat.¹⁹ This is not unexpected of unsophisticated parties who may neither appreciate the implications nor properly estimate the cost. Additionally, it is rarely the case that the parties will finish the arbitration without ever setting foot at the chosen seat, for reasons discussed herein below such as attending to judicial intervention in that seat. Parties will only fail to go where there is an impediment.

¹⁵ Ibid, Savic (n11).

¹⁶ Elgueta G. et.al., Does a right to a physical Hearing exist in International Arbitration, ICCA (International Council for Commercial Arbitration) General Report, 2022.

¹⁷ Ibid, Blake et al (n7) para 29.13.

¹⁸ Ibid, Savic (n 11).

¹⁹ Queen Mary University London, International Arbitration Survey, 2015.

To illustrate further, the reason the seat chosen is often a city, rather than a country should be interrogated. If London is chosen, the legal question is almost settled. English law applies and courts of England and Wales may be moved to intervene, and as far as I am aware they will happily do so.²⁰

I doubt the clarity is as profound when it comes to the geographical question, especially where parties disagree. In the above case, London would not be a compulsory venue. Should the parties elect to conduct the hearings in Oxford, I presume they will be allowed to. How about when they for reasons such as cost of facilities, disagree over the place of hearing with one party suggesting Oxford and the other Manchester. Will a preference be given to London, and can they be compelled to attend hearing there despite their different considerations?

Say further that the parties do not even wish to conduct the hearings in the United Kingdom for similar reasons. In default of agreement on an alternative venue, will a tribunal not be inclined to compel attendance or write a default award? Can the parties refuse to attend on the basis that the venue may cause it to meet inordinately inflated costs, and can costs be challenged on this basis? What happens if the party had not accurately assessed the cost implications of agreeing to a particular seat and wishes to opt out, and the other party refuses? All these considerations beg the question whether parties should clearly designate a seat and a venue. Alternatively, a clarification as to whether the designated seat is a provisional venue, and to what extent a party is bound to attend there when need arises in default of agreement on an alternative place for the conduct of hearings for whatever reason.

This indicates that when it comes to extricating the two aspects of a seat so that the *lex arbitri* of a particular country applies and the hearings are held in another, it is easier said than done. A better phraseology would be saying that a seat is

²⁰ Mutubwa W., Is Nairobi a Safe Seat for International Arbitration? A review of the Supreme Court of Kenya Recent Decisions and its Possible Effects, In Mutubwa W., Commercial and Investment Arbitration; An African Perspective, Nairobi, February 2021, pp. 202-213.

not merely a geographical location.²¹ By this, it is clear that the term encapsulates two aspects. It is a geographical location at the parties' convenience and has far reaching legal effects.

In a nutshell, the convenience of granting the option of a flexible geographical designation is apparent in that the chosen location may be inaccessible for factors outside the control of parties. However, it may impose unanticipated costs. The end result will be that despite having a meticulous arbitration legal regime and thus satisfying the first aspect of suitability, parties are unable to predict with certainty the financial burden that they may have to carry as a consequence.

As Kenya puts its house in order in readiness to becoming an arbitration hub, is it desirable that parties choose Kenya as a seat in both senses as aptly elucidated by scholars and practitioners.²² To my mind, this is the way Kenya can optimize the benefits of being a seat as it stands to gain a lot more. Otherwise, it risks subjecting parties to expensive litigation challenging the seat, should the meaning of the word remain unclear. I will now briefly illustrate this actual risk whose likelihood, impact and severity I have attempted to demonstrate above by looking at seat selection and challenges thereto.

2.2. Designation of a Seat

The parties have the autonomy²³ to designate the seat and the tribunal ought to uphold this intention.²⁴ However, this autonomy is limited for instance where the rules limit the choice to NYC states.²⁵ Failing any designation by the parties, the administering institution or the arbitral institution may decide. In a case where the contract provided for LCIA arbitration, the court held that the seat

²¹ Ibid, Born (n 4).

²² Ibid, Muigua (n14).

²³ Principle of party autonomy- See Born (n 4).

²⁴ Principle of party intention- See Born (n 4).

²⁵ ICSID (International Centre for Settlement of Investment Disputes) Additional Facility Rules, 2006.

was London.²⁶ The country of the institution chosen plays a significant role in deciding the seat.

Additionally, reference can also be made to institutional rules. For instance, the Singapore International Arbitration Centre of (SIAC) Rules have default provisions. However, in a case where the arbitration clause provided for arbitration in accordance with the rules of the ICC in Paris but included a provision that the venue shall be London, the court held that London had been designated as the juridical seat.²⁷ Moreover, the system of law agreed upon as the proper law of the substantive contract or as being the procedural law of the arbitration may be used.²⁸

2.3. Challenges to Choice of Seat

I will now briefly illustrate why challenges to a seat arising from the nomenclature issue are actual. In a case where the arbitration clause provided for the seat as Glasgow, Scotland whereas another clause in the contract provided that the Courts of England Wales had Exclusive jurisdiction to settle disputes under the contract, the court held that England was the designated seat.²⁹

The situation in India is even more illustrative. The Supreme Court of India has considered on three occasions,³⁰ the interpretation of arbitration agreements to determine the choice of seat. The court's holdings are inconsistent and fail to provide clear guidance on this issue.³¹ Consequently, parties pursuing arbitrations having a connection to India are likely to continue facing expensive

²⁶ U&M Mining Zambia Ltd v Konkola Copper Miners plc [2013] 2 Lloyd's Rep 218.

²⁷ Shashoua v Sharma [2009] 2 Lloyd's Rep 376.

²⁸ Egon Oldendorff v Liberia Corporation (No 2) (1996) 1 Lloyd's Rep 380.

²⁹ Braes of Doune Wind Farm (Scotland) Ltd v Alfred McAlpine Business Services Ltd [2008] 2 All ER 492.

³⁰ Union of India v. Hardy Exploration and Production (India) Inc., (2019) 13 SCC 472; BGS SGS Soma JV v. NHPC Ltd., 2019 SCC On-line SC 1585; Roger Shashoua and Ors. v. Mukesh Sharma, [2009] EWHC 957.

³¹ Basu R., The Seat v/s. Venue Debate, A Continuing Saga, The Law Point, 4 June 2020.

and time-consuming litigation related to this issue.³² Kenya must consider avoiding this eventuality.

3.0. Legal and Practical Implications of Choosing Kenya as A Seat

Drawing on the foregoing discussion, I will discuss the fundamental implications for parties that choose Nairobi (Kenya) as their arbitral seat in two respects. The implications are felt throughout the life cycle of an arbitral process. They affect the stages before, during and after arbitration.

I will begin with the *legal implications* flowing from choosing Kenya the juridical home of the arbitration – the “legal” implication. First, Kenyan arbitration law will be the applicable *lex arbitri* (procedural law) used to administer, control or decide control over the arbitration.³³ Precisely, the Arbitration Act of 1995 which is modelled on the UNCITRAL Model Law. For a deeper understanding of the scope, application and interpretation of the Act, Dr. Muigua’s book³⁴ and paper³⁵ are instructive. Kenya has also ratified the New York Convention and the Washington Convention (ICSID).

Second, Kenyan courts will exercise *supervisory jurisdiction* over the arbitration, and the level of intervention will be determined by s 35 of the Arbitration Act, 1995. In so doing, they will be moved in accordance with, and will apply Kenyan arbitration law. The Supreme Court has recently suggested an interventionist approach which has been faulted by the arbitration community as an injury on the image of Kenya’s pro-finality position, as it prepares to be an international arbitration hub.³⁶

³² Anchayir A. & Kumar A., Choice of Seat or Venue: Supreme Court of India Dithers, Kluwer Arbitration, 2020.

³³ Ibid Blake et al (n 7).

³⁴ Ibid, Muigua (n 2).

³⁵ Kariuki Muigua, A lecture on Arbitration Act, 1995 and Arbitration Act 1996 of UK delivered at the Chartered Institute of Arbitrators Kenya Branch Entry Course held at College of Insurance on 25-26th August 2008 (Revised on 2nd March 2010).

³⁶ Ibid, Mutubwa (n21).

Third, Kenya will be the *place of the award*, and the award will bear Kenyan Nationality for purposes of recognition and enforcement. Kenya has ratified the New York Convention on the Recognition and Enforcement of Arbitral Awards and it will be applicable as such.

I will now turn to the *practical implications*. These are covered under section 4.0 which assesses the level of Kenya's compliance with the safe seat principles.

4.0. To What Extent Does Kenya Satisfy the Safe Seat Principles?

A *safe seat* is a place of arbitration where the legal framework and practice of arbitration support recourse to arbitration as a fair, just, and effective dispute resolution mechanism.³⁷ Here, we assess whether Kenya is a safe seat and thus a viable alternative to the established seats. Where it is not possible to assess the situation regarding an issue, it will be put as a *concern* that needs to be addressed to prepare Kenya as a safe seat for further interrogation in subsequent literature. In 2015, the Chartered Institute of Arbitrators- London came up with the ten "Safe Seat Principles" highlighting the key elements of a safe seat.³⁸ The Principles were developed to provide a balanced and independent basis for the assessment of existing seats and to encourage the development of new seats.³⁹ They serve as a blueprint for nascent arbitration jurisdictions and as a yardstick for more established ones⁴⁰ and are useful in prompting states to review and amend laws and institutions to provide appropriate facilities.⁴¹ These, together with existing Kenyan literature on what it takes to make Kenya a preferred seat will form the basis of the assessment.

³⁷ Guide to Arbitration Places, DELOS (Independent Arbitral Institution) 2021.

³⁸ Developed by CIARB Working Group led by Lord Peter Goldsmith QC and CIARB Companion Professor Doug Jones AO and including Judith Gill QC, Julian Lew QC, Constantine Partasides QC, Karyl Nairn QC, Toby Landau QC, Sir Vivian Ramsay, Wendy Miles QC, Peter Rees QC, Maxi Scherer and Audley Sheppard QC.

³⁹ CIARB (Chartered Institute of Arbitrators), A Framework for Evaluating the Best Arbitral Seats (30 Nov 2018).

⁴⁰ Hon. Sundaresh Menon, Chief Justice of Singapore Opening Speech at the CIARB London Centenary Conference.

⁴¹ Ashurst, please be seated: Choosing an Effective Seat of Arbitration, Legal Blog.

Efforts are underway to build an index of the world's arbitral seats using the London Principles as a framework. Further, these seats will receive ratings ranging from 'AAA- Highly desirable' through 'BBB – Reliably supportive of the process and the result' and CCC – 'Some risk to the process and/or the result' to 'D – Not recommendable'.⁴² The question is, will Kenya (Nairobi) be in the list, and what will be our ranking? Even more important, is there anything we can do to improve that, to benefit optimally in the respects alluded to above?

The “**Safe Seat principles**” comprise ten elements: an arbitration law providing a good framework for the process, limiting court intervention, and striking the right balance between confidentiality and transparency; an independent, competent and efficient judiciary; an independent, competent legal profession with expertise in international arbitration; a sound legal education system; the right to choose one's legal representative, local or foreign; ready access to the country for witnesses and counsel and a safe environment for participants and their documents; good logistical support, including transcription, hearing rooms, document handling, and translation; professional norms embracing a diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel; well-functioning venues for hearings and other meetings; adherence to treaties for the recognition and enforcement of foreign awards and arbitration agreements; and immunity for arbitrators from civil liability for anything done or omitted to be done in good faith as an arbitrator.⁴³

Kenyan scholars⁴⁴ leading the Kenyan arbitourism brigade have considered factors such as: enhanced capacity; marketing and arbi-tourism; security; adherence to the rule of law; supportive institutional framework; international cooperation; finality; easy access and travel to Kenya; effective supporting institutions; modern arbitration law; enhanced access to internet and cybersecurity and perception of corruption to be significant in the preparation. The ease of doing business has also been considered a crucial additional factor.⁴⁵

⁴² Ibid, CIArb framework (n 40).

⁴³ Ibid.

⁴⁴ Ibid, Muigua (n 14).

⁴⁵ Ibid, Mutubwa (n 21).

The London principles and these local considerations will form the checklist based on which the assessment below is conducted. I have fit elements of both into the following categories for convenience: the arbitration law, the legal profession, the judiciary, the legal education system, cabinet (ministry of foreign affairs; ministry of interior security and coordination of government, ministry of trade), the country's legal culture and most importantly, commercial parties. For the avoidance of doubt, this does not constitute an exhaustive list but suffices for present purposes.

4.1. The Legislature and the arbitration law

The case in Kenya, as it is across the Commonwealth, is that the legislative process combines a multiplicity of actors, including the judiciary through judicial activism. However, parliament retains legislative sovereignty.⁴⁶ The arbitration law in a safe seat ought to be clear, effective and modern⁴⁷ and to provide a good framework for facilitating a fair and just resolution through the arbitral process, limit court intervention, and strike the right balance between confidentiality and transparency. The Kenyan Arbitration Act 1995 is modern as it is based on the UNCITRAL⁴⁸ Model law which reflects a global perspective. As regards clarity, several issues have been raised over whether it meets these elements, and need to be addressed.⁴⁹ However, it provides an excellent framework for the process. Regarding court intervention, Kenyan courts are not settled on the position to maintain non-interference.⁵⁰ Confidentiality vis-a-vis transparency is another element that needs to be settled. The question whether it is effective is an issue of statistics which has to be addressed subjectively given the peculiarities of a case. Lastly, the consistency and predictability of the law versus finality of the arbitral award has to be considered.⁵¹

⁴⁶ Constitution of Kenya, 2010 (hereinafter COK), art 94.

⁴⁷ Parsons J., *Safety First: Choosing a seat of Arbitration* (Practical Law, 2018).

⁴⁸ United Nations Commission on International Trade Law.

⁴⁹ *Ibid*, Kariuki (n 36).

⁵⁰ *Ibid*, Mutubwa (n 21).

⁵¹ Mutubwa W., *Consistency and Predictability of the Law versus finality of the arbitral award*, In Mutubwa W., *Commercial and Investment Arbitration; An African Perspective*, Nairobi, February 2021, pp. 119-131.

4.2. The Judiciary and the arbitral process

The judiciary ought to be independent, competent and efficient. Judicial *independence* is a multifaceted concept with several fundamental aspects namely: external (from other arms), internal (within the judiciary), individual and institutional.⁵²

Competence may be assessed by looking at the qualifications, criteria for appointment and most importantly, the delivery in terms of turnaround time and quality of jurisprudence.⁵³ It is noteworthy that the competence alluded to here is competence in international arbitration. This capacity is there as far as the judiciary is concerned.

Is it *efficient* in matters of domestic affairs, and what would be the efficiency as far as matters judicial assistance and/or intervention in the international arbitral process are concerned? The latter would necessitate asking the question: to what extent do the courts limit the risk of unnecessary intervention and inappropriate interference?

4.3. The Executive's contribution to the arbitral process

The executive, constitutional commissions and independent offices tasked with the mandate to implement the state's obligations have a bearing on facilitation of arbitration. I will take a few examples to illustrate and elicit the factors to consider. First, ensuring *ready access* (Ministry of Foreign Affairs) and *travel* to the country (Transport and Infrastructure) for witnesses and counsel.

Second, ensuring security to guarantee a *safe environment* for participants and their documents (Ministry of Defense; Interior and Coordination of National Government). Third, ensuring a sound legal education system through the council of legal education (Ministry of Education). The CLE has been actively

⁵² UNODC, Crime Prevention and Criminal Justice, Module 14: Independence of the Judiciary and the role of prosecutors- Main Factor Aimed at Securing Judicial Independence, February 2020.

⁵³ Ibid, Muigua (n14).

reviewing the curriculum to incorporate modern and innovative ways of teaching law, including incorporation of and emphasis on ADR.⁵⁴

Fourth, the issues of *perception of corruption* which impacts on the reputation of a seat which is the primary factor often considered by parties (EACC,⁵⁵ ODPP⁵⁶). Fifth, access to internet and cyber security, data protection and privacy legal framework (Ministry of ICT). Last, ensuring that we improve on our rank in the ease of doing business index (Ministry of Trade).⁵⁷

4.4. The legal profession and the arbitral process

A safe seat ought to have an independent, competent legal profession with expertise in international arbitration. Additionally, professional norms embracing a diversity of legal and cultural traditions, and ethical principles governing arbitrators and counsel. For arbitration counsel, the Law Society of Kenya is in-charge, whose codes of conduct are binding upon lawyers. It also plays a vital role in professional development which would enhance the capacity of counsel to buy into and support the arbitral process. The legal provisions on right to choose a legal representative, local or foreign also have an impact.

As regard arbitrators, they are bound by the Arbitration Act of 1995, the NCIA Act⁵⁸ and institutional rules of CIArb and NCIA. Another principal factor is the immunity for arbitrators from civil liability for anything done or omitted to be done in good faith as an arbitrator.

4.5. Arbitral Institutions and administration of the arbitral process

These ought to provide good logistical support, including transcription, hearing rooms, document handling, and translation. Generally, well-functioning venues for hearings and other meetings. The major actors here would be the two

⁵⁴ Alternative Dispute Resolution.

⁵⁵ Ethics and Anti-Corruption Commission, COK art 79.

⁵⁶ Office of the Director of Public Prosecution, COK art 157.

⁵⁷ Ibid, Mutubwa (n 21).

⁵⁸ Nairobi Centre of International Arbitration Act No 26 of 2013.

institutions, namely the Chartered Institute of Arbitrators- Kenya Branch (CIARB-K) and the Nairobi Centre for International Arbitration (NCIA).

Both of them have been working to enhance the already sufficient capacity and have achieved laudable progress in comparison to their counterparts in the region and beyond. In fact, the legal framework guiding the NCIA has been appraised in the context of the making of an international arbitration hub.⁵⁹ These are best placed to conduct marketing for purposes of arbi-tourism for the country and themselves.

4.6. Legal Culture and the arbitral process

A safe seat has to be adherent to rule of law. The Kenyan government has been faulted as the biggest contemnor of judicial pronouncements, contributing to a culture of impunity. This is however attributable to enforcement issues. As such, in civil suit where it is relatively easier to enforce decisions, the culture and practice is one of compliance. Additionally, Kenya is party to and adherent to the 1958 New York Convention for the recognition and enforcement of foreign awards. A safe seat is also required to demonstrate a culture of international cooperation.

5.0. Comparison with World-Select Destinations

An international arbitration survey conducted by the Queen Mary University of London found out that the five most popular and widely used seats are London, Paris, Hong Kong, Singapore and Geneva.⁶⁰ Other destinations that have been suggested as safe seats include: Amsterdam, Auckland, Berlin, Calgary, Copenhagen, Stockholm, Frankfurt, The Hague, Hamburg, Helsinki, Lisbon, Madrid, Miami, Montreal, Munich, New York, Oslo, Ottawa, Port Louis, Oporto, Rotterdam, Seoul, Sidney, Toronto, Vancouver, Vienna and Zurich.⁶¹

⁵⁹ The Making of an International Arbitration Hub: A Critical Appraisal of the Nairobi Centre for International Arbitration Act 2013, In Mutubwa W., *Commercial and Investment Arbitration; An African Perspective*, Nairobi, February 2021, pp. 181-201.

⁶⁰ Queen Mary University of London (QMUL), *International Arbitration Survey*, 2015.

⁶¹ *Ibid*, *Guide to Arbitration Places* (n 38).

The survey indicated that the *primary factor* that parties actually consider is the reputation and recognition of the seat.⁶² Other sources indicate that parties will be looking for elements in two categories. First, a robust legal framework and second, practical resources. However, the key consideration is neutrality, where parties are avoiding a situation where one has home advantage.⁶³ Parties' preference is as such based upon the formal legal infrastructure, neutrality and impartiality of the legal system, and the national arbitration law and its record for enforcing arbitration agreements and awards.

Conclusion

With international arbitration gaining popularity world over and jurisdictions equally racing to compete to place themselves as potential seats, Kenya has not been left behind. As it hopes into the bandwagon, it has to proceed strategically and consider several focal points.

The starting point is the negotiation and drafting process leading to its designation as a seat. Should the conceptual uncertainties as to "seat/venue" obtaining persist, choices of Kenya may be challenged in expensive and unnecessary litigation as seen in India. The implications of choosing Kenya then follow, both legal and practical (geographical). Both have to be given due consideration by commercial parties and their advisors, which has not entirely been the case.

Lastly, Kenya's preparation to be an international arbitration hub may be assessed on the basis of objective safe seat principles, the factors considered crucial by Kenyan scholars to make Kenya a preferred seat and most importantly, factors considered by parties in real sense, in their choice of the established seats.

This paper has attempted, albeit inconclusively for present purposes, to paint a picture of what proper preparation would entail. It arrives at the conclusion that

⁶² Ibid, QMUL Survey (n 61).

⁶³ Ibid, Parsons (n 48).

Kenya has a lot to offer the region and the world, if the concerns highlighted are sufficiently addressed in the course of the marketing endeavors of the Kenyan arbitration community.

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Dispute Resolution as The Holy Grail of African Integration: Through The Lenses of Africa Continental Free Trade Area and The Belt and Road Initiative

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Abstract

The African Free Continental Trade Area aims to create a single continent-wide market for goods and services, business, and investment in a bid to reshape the African economy and to demonstrate to the world that Africa is finally emerging as a leader in the global trade agenda. It seeks to provide an opportunity for countries in the region to competitively integrate into the global economy, reduce poverty and promote inclusion. The Belt and Road Initiative is a Chinese flagship project with the end goal of building a new global system of alternative economic, political, and security “interdependencies” with China at the centre and which is tremendously influencing African countries.

This paper critically explores the nature of disputes that will result from the ratification of the African Continental Free Trade Area Agreement (AfCFTA) and its impact on the dispute resolution landscape in the continent and as the Holy Grail of establishing regional integration. In undertaking that, this paper seeks to review the AfCFTA Protocol on Dispute Settlement to see whether it is efficient. Additionally, this paper will also comparatively examine the impact of the Belt and Road Initiative in the realm of dispute resolution in Africa, and the resulting challenges and opportunities therein.

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Keywords: *African Continental Free Trade Area, Intra-African Trade, Dispute Resolution, arbitration centres.*

1. Introduction

The AfCFTA is a regional trade agreement that came into force on the 30th of May 2019 and it established the legal framework for a Free Trade Area which seeks to enhance intra-African trade by gradually eradicating tariff and non-tariff barriers to trade.¹ It seeks to create a single integrated market for the movement of goods, services, and people across the African continent.²

Africa as a continent has made significant steps towards the prevention of conflicts and dispute resolution. There are several regional courts, arbitration centres, and dispute resolution systems that advocate for the stability of African countries and promote safe and healthy investments. The most recognizable bodies include the East African Court of Justice, ECOWAS, and COMESA.³ Despite the efforts and track record, certain limits pose hurdles to dispute resolution and the promotion of healthy trade relations in Africa. A unique

¹ African Union, Report to the Specialized Technical Committee on Trade, Industry and Minerals: Progress on the African Continental Free Trade Area (AfCFTA) for the Period from May 2016 to Dec. 2018, 2& 3 (AUC/DTI/AfCFTA/STC/Rep/D).

² "Statement of the Chairperson of the African Union Commission, Moussa Faki Mahamat at the Tenth Extraordinary Session of the Assembly of the Union on the African Continental Free Trade Area, Kigali, Rwanda (21 Mar. 2018) Calling the Agreement the Fourth Ambitious Integration Initiative of the Continent alongside the AEC, AU and AUDA-NEPAD" (March 31, 2018)

https://au.int/sites/default/files/speeches/34028-sp-kigali.cfta_.21.march_.18.final_.pdf
accessed October 24, 2022.

³ Ebobrah, Solomon T., and Victor Lando, 'Africa's Sub-Regional Courts as Back-Up Custodians of Constitutional Justice: Beyond the Compliance Question', in James Thuo Gathii (ed.), *The Performance of Africa's International Courts: Using Litigation for Political, Legal, and Social Change*, International Courts and Tribunals Series (Oxford, 2020; online edn, Oxford Academic, 21 Jan. 2021),

<https://doi.org/10.1093/oso/9780198868477.003.0006> , accessed 24 Oct. 2022.

feature of the resolution of disputes within these RECs is the non-litigious methods invoked.⁴

2. Background Information

Regional integration is the process by which two or more nation-states agree to cooperate and work closely together to achieve peace, stability, and wealth.⁵ Ideally, it takes the form of economic integration through RTA.⁶ Africa is characteristically poverty-ridden, underdeveloped, and largely dependent on the West.⁷ The debt crisis facing the continent is evidence of such dependency.⁸ The Belt and Road Initiative, a prerogative that seeks to connect Africa, Europe, and China has greatly increased African states' debt burden since its inception. This is in addition to the pre-existing debt of about \$21 billion refinanced by China in Africa between 2000 and 2019.⁹ Thus regional integration is crucial to reversing this over-dependency and to propelling the continent towards globalization and subsequent integration into the world economy.¹⁰

⁴James Gathii, "Institutional Issues Related to Successfully Implementing the African Union's Continental Free Trade Agreement," Background Paper Prepared for the African Economic Commission's Eighth Edition of Assessing African Regional Integration Report, February 2017.

⁵<https://carleton.ca/ces/elearning/introduction/what-is-the-eu/extension-what-is-regional-integration/>

⁶ See James T. Gathii, 'African Regional Trade Agreements as Flexible Legal Regimes', 35(3) North Carolina Journal of International Commercial Regulation (2010) 571.

⁷ World Bank Group, "While Poverty in Africa Has Declined, Number of Poor Has Increased" (*World Bank* January 19, 2021) <<https://www.worldbank.org/en/region/afr/publication/poverty-rising-africa-poverty-report>> accessed October 25, 2022.

⁸ Bob Libert, "The Looming Debt Crisis in Eastern and Southern Africa: What it Means for Social Sector Investments and Children", UNICEF Eastern and Southern Africa Regional Office Working Paper, [2021] 2.

⁹ Acker, Kevin, Deborah Brautigam, and Yufan Huang. 2020. *Debt Relief with Chinese Characteristics. Working Paper No. 2020/39. China Africa Research Initiative, School of Advanced International Studies, Johns Hopkins University, Washington, DC.*

¹⁰ International Trade Effects of Regional Economic Integration in Africa: The Case of the Southern African Development Community (SADC) Mengesha Yayo, Sisay Asefa <https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=1038&context=ijad>

Regional Trade Agreements (RTAs) are key infrastructure for promoting regional cohesion and economic growth.¹¹ RTAs are used to refer to any trade agreement between countries, whether bilateral, cross-regional, or multi-country.¹² As is typical of any contractual relationship, RTAs attract interpretation and enforcement disputes which demand optimal resolution, to preserve pre-existing relationships. Dispute Settlement Mechanisms (DSMs) are customarily provided for in the agreements. Modern RTA DSMs involve a common set of core values spanning from initiation of disputes, to methodology (negotiation, mediation¹³, and adjudication), procedures, implementations, and appeal provisions.

The proposition to adopt the World Trade Organization DSM (with minimal reservations) by the African Continental Free Trade Area (AfCFTA) appears to be a mere afterthought by the drafters.¹⁴ The inadequacies of the WTO DSM ranging from enforcement of awards and its appeal mechanism, which is currently dispensed, would make it unsuitable for application elsewhere without remedying them. The suitability of litigation and other existing RTA DSM abovementioned would similarly be suicidal to its hope of regional integration. This is great because the certain design and institutional limitations

¹¹ Aaditya Mattoo , 'Regional Trade Agreements' (World Bank, 5 April 2015) <<https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements>> accessed 28 September 2022

¹² McDougall, Robert. 2018. Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution. RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB). <www.rtaexchange.org/> Last accessed 28 September 2022.

¹³ Framework Agreement On Comprehensive Economic Co-Operation Between the Association of South East Asian Nations and The People's Republic of China, Article 11 (2).

¹⁴ Gerhard Erasmus, 'Dispute Settlement in and About the AfCFTA: What to Expect? - Tralac Trade Law Centre' (Tralac.org, 2022) <<https://www.tralac.org/blog/article/15707-dispute-settlement-in-and-about-the-afcfta-what-to-expect.html> > accessed 29 September 2022.

would render them useless.¹⁵ Similarly, underreporting by state parties would maim such “DSMs”. African states are infamous for snubbing litigation in dispute resolution. AfCFTA is thus presented with a unique opportunity to establish a DSM that is tailored to the African situation and one that would result in the continent’s realization of its economic potential. Sustainable economic regional integration demands a robust DSM. To this end, the article sets out to make a case for the DSM by AfCFTA as the Holy Grail for the region’s integration.

It is exceptional that even at the international level, Alternative Dispute Resolution (ADR) mechanisms are acknowledged as viable dispute resolution methods. The United Nations Charter is one such treaty that recognizes the significance of ADR mechanisms play an important role in the resolution of interstate disputes, and it provides that the parties to any dispute should first try to resolve it through negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, and other methods peaceful means of their choosing.¹⁶ They are regarded as viable methods of promoting peace within and between states and in this case African states.

3. The place of AfCFTA in Regional integration

AfCFTA tailors commitments to countries' needs and capacities, allowing for incremental implementation. It also shares many similarities with existing African RTAs, which incorporate flexibility and variable geometry into their structures.¹⁷ Article 5 of the AfCFTA provides that the Free Trade Areas (FTAs) established under the Regional Economic Communities will be used “as

¹⁵ McDougall, Robert. 2018. Regional Trade Agreement Dispute Settlement Mechanisms: Modes, Challenges and Options for Effective Dispute Resolution. RTA Exchange. Geneva: International Centre for Trade and Sustainable Development (ICTSD) and the Inter-American Development Bank (IDB). < www.rtaexchange.org/ > Last accessed 28 September 2022.

¹⁶ Article 33 of the Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

¹⁷ James Thuo Gathii, African Regional Trade Agreements as Flexible Legal Regimes, 35 N.C. J. INT’L L. & COM. REG. 572, 573 (2010).

building blocks for the AfCFTA.” Article 19 of the AfCFTA states that the AfCFTA will take precedence over a regional set of rules in the event of a conflict or inconsistency, and it enshrines the *acquis* principle that higher levels of integration achieved through the RECs will be maintained.¹⁸

The AfCFTA is a comprehensive partnership agreement that will consolidate its various agreements into a single undertaking. The phase one protocols adopted include a protocol on trade in services, a protocol on trade in goods, and a protocol on dispute resolution rules and procedures. The Agreement's objectives are to foster social and economic development in Africa through intra-Africa trade, structural transformation, and competition among the continent's economies. It seeks collaboration in the removal of non-tariff barriers, the liberalization of trade in services, and the implementation of trade facilitation measures.¹⁹

There are eight regional economic communities in Africa: the Arab Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), the Common Market for Eastern and Southern Africa and the Community of Sahel-Saharan States (COMESA), the Eastern African Community (EAC), the Economic Community of Central African States (ECCAS), the Economic Community of the West African States and Economic Community of Central African States (ECOWAS), the Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).²⁰

By establishing a single market for goods with eased tariffs, the AfCFTA strengthens state parties' economies which in turn lower overreliance on external markets. The Protocol provides for a liberalized market for goods for

¹⁸Article 19 of the AfCFTA.

¹⁹ AfCFTA article 3.

²⁰ Poorva Karkare and Bruce Byiers, 'Making Sense of Regional Integration in Africa - ECDPM' (ECDPM, 2019) <https://ecdpm.org/talking-points/making-sense-of-regional-integration-in-africa/> accessed 27 September 2022.

state parties.²¹ This will in turn integrate Africa's market and lower the cost of doing business. State parties are similarly mandated to eliminate tariffs and other trade barriers in the realization of this new African Market.²² These strategies coupled with the continental preferences proposed in the Protocol will create a self-sufficient unit with the potential to develop into a world economy.²³ Africa's great export dependence on the rest of the world (estimated to be between 80-90 % in 2017) will be lowered if a conducive environment for intra-African exporting is created.²⁴ The range of raw materials in Africa and a corresponding single market will propel the regional economy into the international market. Similarly, the advancements in infrastructure proposed by the AfCFTA will reduce the overreliance placed on the "Belt and Road Initiative".

Regional Integration is an agreement among states to cooperate in a bid to promote stability.²⁵ Integration may be economic or political. Economic integration is the process by which different countries agree to remove trade barriers between them.²⁶ This customarily takes the form of ratification of RTAs and culminates in political integration as the development of a single market would subsequently necessitate more common policies.²⁷ The result of regional integration is a reduction in trade costs and an improvement in policy cooperation across countries, which increases international trade and

²¹ The Agreement Establishing the AfCFTA founded the African Continental Free Trade Area, Article 3 (b)

²² The Protocol on Trade in Goods, in the preamble.

²³ The Protocol on Trade in Goods, Article 4.

²⁴[1] "UNCTAD: Press Release: Facts & Figures" (UNCTAD June 26, 2019) <<https://unctad.org/press-material/facts-figures-0>> accessed October 25, 2022

²⁵ Asian Development Bank, "Regional Cooperation and Integration in a Changing World" (Asian Development Bank February 5, 2018) <<https://www.adb.org/publications/regional-cooperation-and-integration-changing-world>> accessed October 25, 2022.

²⁶<https://carleton.ca/ces/elearning/introduction/what-is-the-eu/extension-what-is-regional-integration/>

²⁷ Ibid

investment, economic growth, and social welfare.²⁸ Such successes encourage trade under RTAs and consequently integration.

An efficient DSM will enable these relations to be maintained. Alternative Dispute Resolution is commendable for maintaining relationships after resolution. African states have been reluctant to litigate trade disputes between themselves.²⁹ An effective DSM within AfCFTA would promote regional integration in two ways. The promotion of regional integration within the AfCFTA lies in the non-litigious settlement of disputes amongst its members.³⁰

4. The Dispute Resolution Framework within AfCFTA

Only disputes arising from AfCFTA agreements are intended to be resolved by the AfCFTA dispute settlement mechanism. The AfCFTA permits a complainant to select the appropriate forum for resolving a dispute when its subject matter can be heard by more than one dispute resolution mechanism.³¹ However, once that forum is chosen, the complainant may not bring that dispute to any other forum.³² Article 20 of the AfCFTA agreement encompasses the AfCFTA dispute resolution mechanism, which is regulated by the AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes.³³

²⁸ World Bank Group, "Regional Trade Agreements" (*World Bank* December 22, 2020) <<https://www.worldbank.org/en/topic/regional-integration/brief/regional-trade-agreements#:~:text=They%20reduce%20trade%20costs%20and,economic%20growth%20and%20social%20welfare.>> accessed October 25, 2022.

²⁹ James Thuo Gathii, Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Area

³⁰ James Gathii, "The Variation in the Use of Sub-Regional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice," 74 *Law and Contemporary Problems* (2014).

³¹ Article 6(1), 7 of the Dispute Protocol calls.

³² Art 3 (4) of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes.

³³ Art 20 of the Agreement Establishing the AfCFTA. See also, The AfCFTA Protocol on the Rules and Procedures on the Settlement of Disputes.

When a request for a consultation to find an amicable resolution is made, the dispute resolution mechanism is activated.³⁴ According to the Protocol, state parties must provide an affordable opportunity for consultations; requests for consultations are made through the Dispute Settlement Body. The time frame for such resolution is sixty days, or ten days in cases of urgency, such as perishable goods disputes.³⁵

Another option for state parties is to use good offices, mediation, and conciliation mechanisms. The Secretariat facilitates the process, and both the Dispute Settlement Body (DSB) and the Secretariat are notified. Arbitration can be used as a first resort to settle disputes when parties agree not to proceed through ad hoc panels. The arbitration award is forwarded to the DSB for enforcement.

Representatives of state parties constitute the Dispute Settlement Body.³⁶ It is tasked with establishing dispute resolution panels and an Appellate Body, adopting their reports, monitoring the implementation of the rulings, and authorizing the suspension of concessions or other obligations under the agreement. The DSB makes decisions by consensus.³⁷

When consultations, good offices, or arbitration mechanisms are unable to be used, state parties may request panel formation through the DSB.³⁸ The DSB is made up of representatives from state parties. The panel is formed within ten

³⁴ Article 3.3 Agreement establishing the African Continental Free Trade Area, Protocol on Rules and Procedures on the settlement of disputes.

³⁵ Article 7 of the Agreement establishing the African Continental Free Trade Area, Protocol on Rules and Procedures on the settlement of disputes.

³⁶ Article 5.2 of the Protocol and Procedures on the Settlement of Disputes within AfCFTA.

³⁷ See Article 5 of the Protocol and Procedures on the Settlement of Disputes within AfCFTA.

³⁸ Article 9.1 of the Protocol and Procedure on the Settlement of Disputes within AfCFTA.

days of the DSB meeting.³⁹ The Secretariat maintains a list of panelists. Third-party participants in the dispute are permitted under the framework. The panel submits its findings to the DSB in the form of a written report for adoption.⁴⁰

The DSB also establishes the Appellate Body, which is charged with the mandate of deciding appeals from panel decisions. The members of the Appellate Body serve for four years on a rotating basis. The framework also states that if the DSB fails to appoint a member of the Appellate Body within two months, the Chair of the DSB, in consultation with the Secretariat, may do so.⁴¹ Within sixty days, the appeal should be resolved.

Compliance proceedings can also be brought before the dispute resolution mechanism. During the implementation phase of the panel rulings, parties or the Secretariat may appoint an arbitrator in consultation with the DSB. The Protocol also provides for temporary enforcement measures such as compensation and concession suspension imposed by the DSB.⁴²

5. Limits of the AfCFTA Dispute settlement

The AfCFTA has jurisdiction limited to state parties.⁴³ Correspondingly, a dispute is defined under Article 1 of the Protocol as ` a disagreement between State Parties regarding the interpretation and/or application of the (AfCFTA) Agreement in relation to their rights and obligations. ` The Protocol further limits the application of the AfCFTA to disputes between State Parties concerning their rights and duties as to the extent of the AfCFTA Agreement. An interpretation of this is taken to mean that private entities do not have the locus standi to invoke the jurisdiction of the AfCFTA DSM procedures in case of a cross-border commercial dispute. Although the Economic Community of West African States, Common Market for Eastern and Southern Africa, and the

³⁹ Ibid, Art, 9.5.

⁴⁰ Article 18 of the Protocol and Procedure on the Settlement of Disputes.

⁴¹ Article 20.6 Protocol on Rules and Procedures on the settlement of disputes.

⁴² Article 25 Protocol on Rules and Procedures on the settlement of disputes.

⁴³ AfCFTA, Article 20.

East African Court of Justice has a system of rules governing cross-border disputes among private entities, they have not managed to address the above mentioned challenge.⁴⁴

In the same vein, Onyema wonders whether African states can espouse claims of their citizens suppose these citizens suffer a loss due to the measures of the dispute resolution system.⁴⁵ It is worth noting that states may always raise diplomatic protection for their citizens and the WTO DSM does not prohibit this. Can African states use the DSM engraved in the AfCFTA to bring claims for their citizens? Whereas this is possible, most of such disputes fall under the category of commercial disputes, which necessitate the establishment of a system of pan-African Conflict of Laws.⁴⁶

Most African states face a lot of insignificance in implementing policies. For instance, scholars argue that FTA implementation disputes arise especially in transnational disputes, which are expensive and marred with procedural technicalities. Such challenges are highly likely to cause uncertainty for investments and trading relations.⁴⁷ It is to this end that Eurallya suggests that the CFTA must employ adequate modes of dispute prevention and resolution such as the use of ADR without necessarily duplicating the modes under the WTO.⁴⁸ She states that such mechanisms should be expeditious, efficient, quick to respond to the disputants, cost affordable, and easy to use.⁴⁹

⁴⁴ Eurallyah Akinyi, 'Conflict of Laws and Intra-African Commercial Disputes: To What Extent Does (Lack of) A Harmonized Pan-African Conflict of Laws Regime Support the AfCFTA Liberalization Agenda?' (12 December 2021) Available at <https://www.afronomicslaw.org/category/analysis/conflict-laws-and-intra-african-commercial-disputes-what-extent-does-lack> Accessed on 27 September 2022.

⁴⁵ Ibid

⁴⁶ Ibid

⁴⁷ 2016 UNCTAD Report

⁴⁸ Ibid (n24)

⁴⁹ Ibid

Furthermore, the AfCFTA adoption of a World Trade Organization-like system of dispute resolution brings about a challenge since African countries lack a history of litigating trade issues against each other. This casts doubts on AfCFTA's commitment to the vision of dispute settlement.⁵⁰

Arbitration to the rescue?

As investments and trade in Africa continue to grow, it is imminent that conflicts will arise thus the need for a stronger framework for dispute resolution. A recent report indicates an improved preference for arbitration over litigation and other modes of dispute resolution.⁵¹ The report by Herbert states that investments continue to improve despite the impacts of the Covid pandemic and that there are high chances for the use of arbitration in the future in Africa.⁵²

For a long time, states and investor companies have preferred negotiation and commercial settlements over arbitration during conflicts thus utilizing the established avenues. However, the increase in foreign investment in the continent has elevated the formal means of dispute resolution, specifically arbitration.

⁵⁰ James Thuo Gathii, 'Evaluating The Dispute Settlement Mechanism of The African Continental Free Trade Agreement' (Google.com, 2019) <https://www.google.com/url?sa=t&source=web&rct=j&url=https://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-tradeagreement&ved=2ahUKEwj7MSf2Lr6AhUMuaQKHQRYAEgQFnoECAQQAQ&usg=AOvVaw3bb_X3Vdr9piHfocpIP_iV> accessed 29 September 2022.

⁵¹ "The Guide to Dispute Resolution in Africa 2022" (Herbert Smith Freehills | Global law firm March 22, 2022) <<https://www.herbertsmithfreehills.com/insight/africa-disputes-guide-2022>> accessed October 25, 2022

⁵² ICLG, 'African arbitration centres on the rise' (25 March 2022) Available at <https://www.google.com/url?sa=t&source=web&rct=j&url=https://iclg.com/alb/17761-african-arbitration-centres-on-the-rise/amp&ved=2ahUKEwjxNGtt574AhXNwQIHHCFrnoECAQQAQ&usg=AOvVaw0PUIgOiGwt1HZ2oITe09Vj> Accessed on 27 September 2022.

6. Comparative analysis; dispute resolution within the Belt and Road Initiative

In 2013, the Chinese Government launched an ambitious economic integration blueprint dubbed ‘The Silk Road Economic Belt and the 21st-century Maritime Silk Road’ commonly referred to as the “Belt and Road Initiative”.⁵³ The Initiative aims to promote the connectivity of Asian, European, and African continents and their adjacent seas, establish and strengthen partnerships among state parties, set up composite connectivity networks, and realize development in these countries.⁵⁴ The core of the program is transcontinental continental integration through Chinese investment and infrastructure.

With the voluminous membership of the BRI, disputes were inevitable from the onset. It is against this argument that one would wonder why there was no provision for dispute settlement in the initial BRI policy papers.⁵⁵ Jiangyu Wang has classified the disputes typical of the BRI into three categories that are state-state disputes (involving state parties to the BRI with China’s investment and those between private Chinese investors and state parties), transactional disputes, and investment disputes (involving the People’s Republic of China and state parties).⁵⁶

⁵³Bernardo Cartoni, ‘The “Belt and Road Initiative” And The Tools to Solve “Bri-Related” Disputes’ (International Arbitration and the Jurisdiction of Arbitral Tribunals, Madrid, December 2019).

⁵⁴ Vision and Actions on Jointly Building Silk Road Economic Belt and 21st -Century Maritime Silk Road”, Part I: “Background” (the PRC National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce, March 28th 2015) < http://www.china.org.cn/chinese/2015-09/15/content_36591064.htm > Accessed 29 September 2022.

⁵⁵ Jiangyu Wang, “Managing Editor’s Introduction: Dispute Settlement for the Belt & Road Initiative – Progress, Issues, and Future Research Agenda” (2020) 8(1) Chinese Journal of Comparative Law (forthcoming); City University of Hong Kong Centre for Chinese and Comparative Law Research Paper Series Paper No. 2020/008 < <https://ssrn.com/abstract=3600628> >Accessed 29 September 2022

⁵⁶ Ibid

There is a general preference to apply non-litigious modes of dispute resolution in resolving the above-mentioned disputes. Mediation is generally encouraged as the primary DSM with appeals to arbitration. The recourse to mediation is rooted in the Chinese culture of harmony as Cartoni proposes.⁵⁷ Following this, it is commonplace for state-state disputes to be resolved through closed-door mediation and negotiations.

Arbitration is also preferred as the People's Republic of China has similarly empowered Chinese arbitration centres to spearhead arbitration in disputes around the BRI.⁵⁸

The Supreme People's Court of China founded the China International Commercial Court as an alternative recourse to disputing parties under the BRI.⁵⁹ The Court has a panel of three or more judges and an International Commercial Expert Committee to advise the court on foreign law. The procedure under the court initially involves mediation to give effect to the culture of harmony. It has jurisdiction to hear and determine disputes relating to the BRI where the parties decided so in their Dispute Settlement clause or agreement. The court recognizes the need to resolve disputes harmoniously and through negotiations desirous of maintaining relationships among states and

⁵⁷ Bernardo Cartoni, 'The "Belt and Road Initiative" And The Tools to Solve "Bri-Related" Disputes' (International Arbitration and the Jurisdiction of Arbitral Tribunals, Madrid, December 2019).

⁵⁸ Jianguyu Wang, "Managing Editor's Introduction: Dispute Settlement for the Belt & Road Initiative – Progress, Issues, and Future Research Agenda" (2020) 8(1) Chinese Journal of Comparative Law (forthcoming); City University of Hong Kong Centre for Chinese and Comparative Law Research Paper Series Paper No. 2020/008 <<https://ssrn.com/abstract=3600628>>. Accessed on 29 September 2022.

⁵⁹ "China Has Established International Commercial Court for Commercial Disputes under BRI" (*Legal, tax, audit and management and IT consulting* September 25, 2018) <<https://www.roedl.com/insights/china-international-commercial-court-commercial-disputes-bri>> accessed October 25, 2022

other contracting parties. The decisions of the court may be appealed to the Supreme People's Court headquarters for a retrial.

AfCFTA could borrow a leaf from BRI in encouraging the use of ADR to resolve commercial disputes. The thriving and continuing existence of the BRI could be greatly attributable to the harmony-centered DSM adopted by the program. The desire to promote private parties' commercial relationships and government diplomatic relationships has greatly contributed to the project's implementation.

Conversely, AfCFTA should be discouraged from synonymous adoption of the World Trade Organization DSM. The reliance on the WTO mechanism to resolve investment disputes has left many actors in the BRI in the lurch as the mechanism is currently experiencing a deadlock.⁶⁰ AfCFTA should be encouraged to develop an independent DSM that will withstand similar challenges.

7. Concluding thoughts

The full realization of AfCFTA will greatly reduce Eurocentric dependence. The AfCFTA is at the forefront of changing the patterns of trade and restricting intra-African trade. The architecture of dispute resolution within the African framework should be enhanced. In the context of dispute resolution within this Regional Trade Agreement, there is a need for African policymakers to capitalize on the continental dialogue on the resolution of disputes within AfCFTA in forging a common vision that could be utilized. It is also of essence that alternative dispute settlement mechanisms are promoted so as to actively involve more states and communities.

⁶⁰ Ibid

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*Dispute Resolution as The Holy Grail of African
Integration: Through The Lenses of Africa Continental
Free Trade Area and The Belt and Road Initiative:
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Review: Journal of Conflict Management and Sustainable Development Volume 9 Issue 1

*By: Mwati Muriithi**

Published in October 2022, the Journal of Conflict Management and Sustainable Development Volume 9 Issue 2 is focused on disseminating knowledge and creating a platform for scholarly debate on pertinent and emerging areas in the fields of Conflict Management and Sustainable Development.

It is edited by the African Arbitrator of the Year 2022, Dr. Kariuki Muigua, PhD who has earned his reputation as a distinguished legal practitioner in Kenya and a leading environmental scholar in Africa and the world. The Journal analyses some of the current concerns and proposes interventions towards attaining Sustainable Development. It also discusses the role of Conflict Management in the quest towards Sustainable Development.

Dr. Kariuki Muigua, the winner of the Inaugural CIArb Kenya Branch ADR Lifetime Achievement Award, has demonstrated his prowess and sound understanding of Environmental, Social and Governance (ESG) principles in his article '*Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya*'. It critically examines the extent to which Environmental, Social and Governance (ESG) principles have been embraced in Kenya. He argues that ESG has emerged as probably the most important tool of corporate governance. ESG seeks to shape corporate decision making by advocating for sustainable, responsible and ethical investments. The article analyses each of the ESG principles and the progress made towards embracing this concept in Kenya. It further addresses some of the ESG challenges in Kenya and suggests the way forward towards embracing ESG principles for sustainable development in Kenya.

* LLB (Hons) KU; Dip. In Law (KSL); ACIArb; Advocate of the High Court of Kenya; Legal Researcher.

'Kenya's Legal Viaduct to Environmental Sustainability' by Polycarp Moturi Ondieki contextualizes and conceptualizes Kenya's legal system and how it has been able to attain sustainability. He discusses the laws that have since been enacted, the cases that have been decided and the agencies that have been created to ensure the attainment of sustainability in Kenya. In addition to that, he shows how the various principles of sustainable development have been achieved in Kenya through the existing legal system.

'Impact of Contemporary Weapons and Technology on International Humanitarian Law: A Case for Consideration' by Dr. Kenneth Wyne Mutuma makes an assessment of the effectiveness and efficiency of existing IHL rules and conventions in addressing the issues precipitated by the contemporary technologies and weapons in the context of armed hostilities. The article offers recommendations in its conclusion which, when adopted, would make the IHL rules not only relevant but also effective and adequate in addressing the existing challenges posed by new technologies and weapons.

Limlim Thomas Elim in his paper, *'Right to Health: Critical Analysis of Kenyan Legal Framework'* traces the legal concept of health and its association to the right to health by analysing the Kenyan legal framework. The article proposes legal reforms for the appropriate actualization of the right to health as per the constitutional and international law intendment.

'Biodiversity Mainstreaming for Food and Nutrition Security in Kenya' by Dr. Kariuki Muigua makes a case for some of the ways that Kenya can mainstream biodiversity conservation debates into measures geared towards achieving food and nutritional security.

Henry K. Murigi in his paper *'Law History and Politics in Developing Societies: A Comparative Analysis of Constitution Making Process in Australia and United Arab Emirates'* compares the politics surrounding the constitution making in Australia and United Arab Emirates. He considers the claims made as to how

these two States came up, how they manage their politics, mainly as contained in their respective Constitution making process and political practices.

'Money Laundering and The Role of the Advocate - A Comparative Analysis of Kenyan and South African Law' by Viola Wakuthii explores the basics of money laundering and the role of the advocate in Kenya, in comparison with the role of the South African attorney. It refers to the Proceeds of Crime and Anti-Money Laundering Act No. 9 of 2010 Laws of Kenya as well as the Financial Intelligence Centre Act No. 38 Laws of South Africa. The author concludes that the Kenyan lawyer is an important part of the fight against money laundering, and should be included as a reporting entity.

Mwati Muriithi in his article *'Journal Review: Alternative Dispute Resolution Journal Volume 10 Issue 3'* notes that The Alternative Dispute Resolution Journal Volume 10 Issue 3 covers pertinent and emerging issues across all ADR mechanisms including arbitration, mediation, negotiation, adjudication and traditional justice systems. It provides a platform for scholarly debate and in-depth investigations into both theoretical and practical questions in Alternative Dispute Resolution.

'Exploring Poverty in South Sudan through the Lens of Multidimensional Poverty Approach' by Matai Muon focuses on the nature, patterns and measurement of poverty in South Sudan through the lens of multidimensional poverty approach. In so doing, it reviews the existing body of knowledge using a variety of tools and methodologies from both the income-based and the multidimensional-based approaches.

Lastly, *'Book Review: Exploring Conflict Management in Environmental Matters - Kariuki Muigua, Ph.D., FCI Arb, (C. Arb), Glenwood Publishers, 2022'* by Jack Shivugu points out that *Exploring Conflict Management in Environmental Matters* by Dr. Kariuki Muigua is written in a clear and concise language and the author maintains high standards of intellectual diligence and critical analysis of issues

throughout the book. The book is a useful resource for policy makers, legislators, practitioners, lecturers, students and the public at large.

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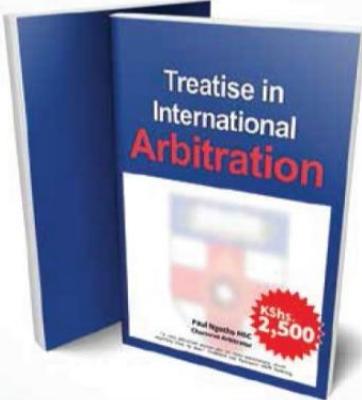
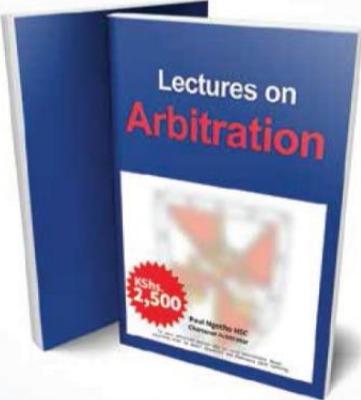
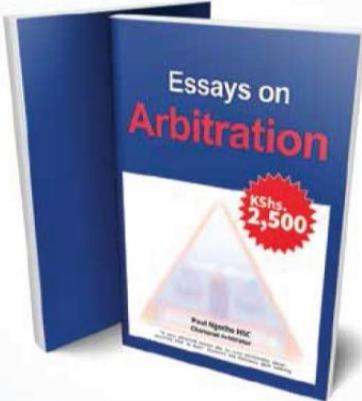
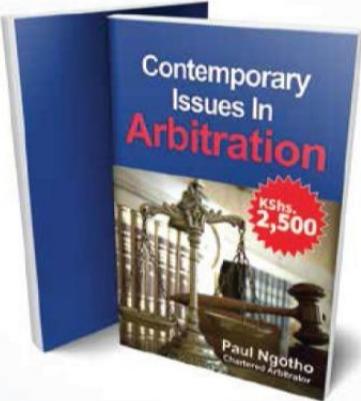
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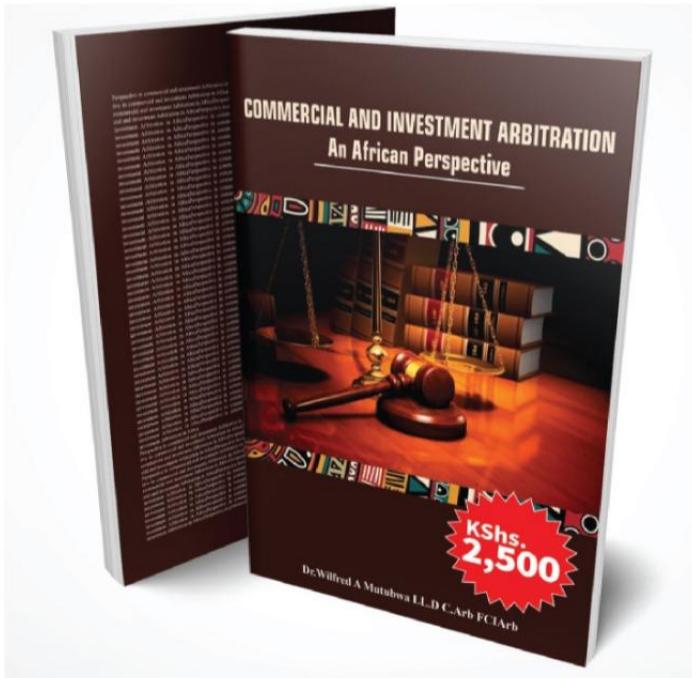


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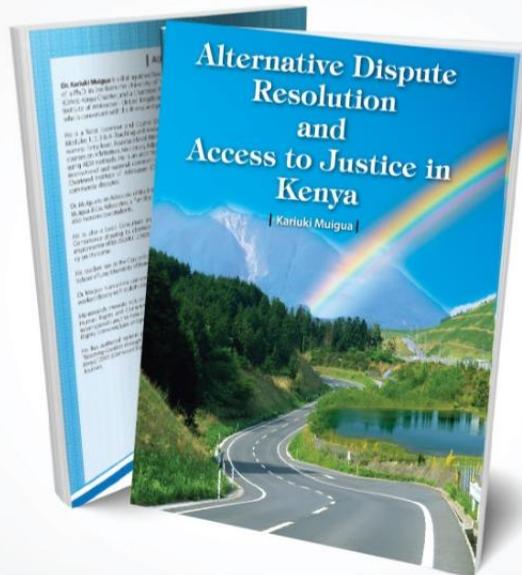
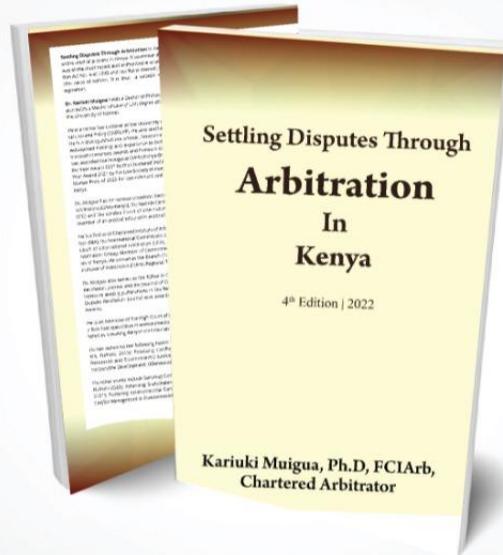
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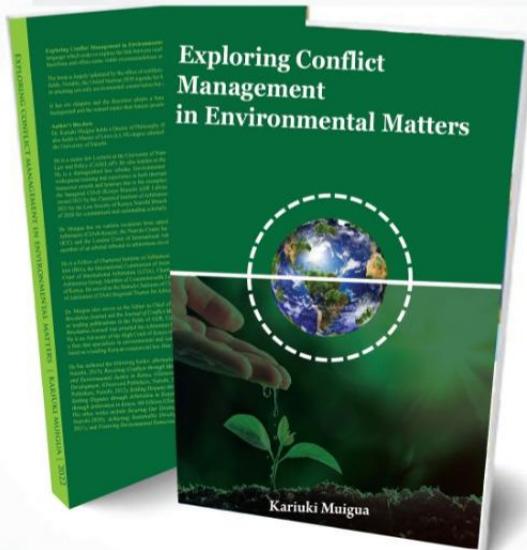
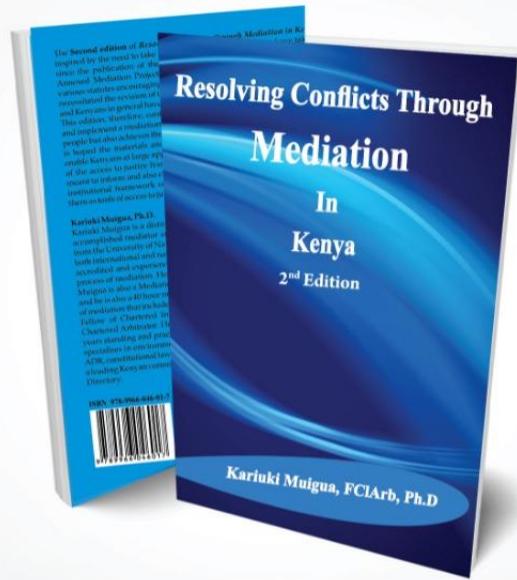
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